

OPINIONS  
OF THE  
**OFFICE OF LEGAL COUNSEL**  
OF THE  
UNITED STATES DEPARTMENT OF JUSTICE  
CONSISTING OF SELECTED MEMORANDUM OPINIONS  
ADVISING THE  
**PRESIDENT OF THE UNITED STATES,**  
**THE ATTORNEY GENERAL,**  
AND OTHER EXECUTIVE OFFICERS OF  
THE FEDERAL GOVERNMENT  
IN RELATION TO  
THEIR OFFICIAL DUTIES

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## FOREWORD

The Attorney General has directed the Office of Legal Counsel to publish selected opinions on an annual basis for the convenience of the Executive, Legislative, and Judicial Branches of the government, and of the professional bar and the general public. The first twenty-seven volumes of opinions published covered the years 1977 through 2003. The present volume covers 2004. Volume 28 includes Office of Legal Counsel opinions that the Department of Justice has determined are appropriate for publication.

The authority of the Office of Legal Counsel to render legal opinions is derived from the authority of the Attorney General. The Judiciary Act of 1789 authorized the Attorney General to render opinions on questions of law when requested by the President and the heads of executive departments. This authority is now codified at 28 U.S.C. §§ 511–513. Pursuant to 28 U.S.C. § 510, the Attorney General has delegated to the Office of Legal Counsel responsibility for preparing the formal opinions of the Attorney General, rendering opinions to the various federal agencies, assisting the Attorney General in the performance of his or her function as legal adviser to the President, and rendering opinions to the Attorney General and the heads of the various organizational units of the Department of Justice. 28 C.F.R. § 0.25.

As always, the Office expresses its gratitude for the efforts of its paralegal and administrative staff—Elizabeth Farris, Melissa Kassier, Richard Hughes, Joanna Ranelli, Dyone Mitchell, and Lawan Robinson—in shepherding the opinions of the Office from memorandum form to online publication to final production in these bound volumes.



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**OPINIONS**

OF THE

**OFFICE OF LEGAL COUNSEL**



## Assertion of Constitutionally Based Privilege Over Reagan Administration Records

It is legally permissible for President Bush to assert constitutionally based privilege in concurrence with former President Reagan's assertion of constitutionally based privilege over certain Reagan Administration documents that are otherwise required to be released by the National Archives and Records Administration under the Presidential Records Act.

January 12, 2004

### LETTER OPINION FOR THE COUNSEL TO THE PRESIDENT

You have requested my advice as to whether it is legally permissible for the President to assert constitutionally based privilege with respect to certain Reagan Administration documents that are otherwise required to be released by the National Archives and Records Administration ("NARA") under the Presidential Records Act ("PRA"), 44 U.S.C. §§ 2201–2207 (2000). Former President Reagan has asserted constitutionally based privilege with respect to eleven documents. Under the applicable executive order, there is a strong presumption that the incumbent President will concur in the assertion of constitutionally based privilege by a former President. *See* Exec. Order No. 13233, § 4, 3 C.F.R. 815, 817 (2002) ("Absent compelling circumstances, the incumbent President will concur in the privilege decision of the former President"). Thus, the specific legal question presented to me is whether it would be legally permissible for the President to assert constitutionally based privilege in concurrence with former President Reagan's assertion.

The documents subject to former President Reagan's assertion are all internal White House deliberative documents either addressed to the President or other senior White House officials or recording deliberations involving the President or other senior White House officials, except for one deliberative memorandum from the Attorney General to the President. They all were prepared in connection with presidential decisionmaking. The documents fall squarely within the scope of the presidential communications privilege. *See generally United States v. Nixon*, 418 U.S. 683, 705–13 (1974); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 446–55 (1977). The Supreme Court has recognized

the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the

operation of Government and inextricably rooted in the separation of powers under the Constitution.

*United States v. Nixon*, 418 U.S. at 708. The presidential communications privilege is not limited to advice and other communications made directly to the President. The privilege also applies to other communications made in the course of presidential decisionmaking, such as deliberative comments made within the White House or communicated to White House staff in connection with the preparation of advice to the President. The Supreme Court has recognized that the privilege covers “communications between high Government officials and those who advise and assist them in the performance of their manifold duties.” *Id.* at 705. *See also In re Sealed Case*, 121 F.3d 729, 757 (D.C. Cir. 1997) (the privilege “extends to cover communications which do not themselves directly engage the President, provided the communications are either authored or received in response to a solicitation by presidential advisers in the course of gathering information and preparing recommendations on official matters for presentation to the President”). The Supreme Court has stated that “the importance of this confidentiality is too plain to require further discussion.” *United States v. Nixon*, 418 U.S. at 705.

In addition to being subject to the presidential communications privilege, these deliberative and predecisional documents are also subject to the government-wide deliberative process component of the President’s constitutionally based privileges. *See generally Confidentiality of the Attorney General’s Communications in Counseling the President*, 6 Op. O.L.C. 481, 484–90 (1982); *Congressional Requests for Confidential Executive Branch Information*, 13 Op. O.L.C. 153, 154–57 (1989). Counsel for former President Reagan also relied on the attorney-client privilege and the attorney work-product doctrine in support of the former President’s privilege assertion. *See* Letter for Gary M. Stern, General Counsel, NARA, from John A. Mintz at 2 (Jan. 8, 2004). There is no need to consider the applicability of those privileges in light of the applicability of the presidential communications and deliberative process privileges.

Finally, the fact that these documents are from a prior presidential administration and date from the 1980s does not preclude the assertion of privilege. The Supreme Court has held that “the privilege survives the individual President’s tenure.” *Nixon v. Adm’r*, 433 U.S. at 449 (quoting Solicitor General’s Brief at 33). The Court expressly adopted the Solicitor General’s rationale:

This Court held in *United States v. Nixon* . . . that the privilege is necessary to provide the confidentiality required for the President’s conduct of office. Unless he can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends. *The confidentiality necessary to this*

*exchange cannot be measured by the few months or years between the submission of the information and the end of the President's tenure; the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic.*

*Id.* at 448–49 (quoting Solicitor General's Brief at 33) (emphasis added).

The documents that are subject to the privilege claim are not being sought by a coordinate branch of the government. Therefore, I do not believe there is a need to consider whether any asserted justification for disclosure might outweigh the President's constitutionally based interest in the confidentiality of deliberations relating to presidential decisions. However, even if a court were to conclude that assertions of constitutionally based privileges in connection with NARA releases under the PRA are subject to a balancing test, I believe that the court would find that the confidentiality interests underlying the assertion of privilege with respect to these candid, highly deliberative presidential decisionmaking documents outweigh Congress's generalized interests, in enacting the PRA, in providing for public release of presidential records.

In conclusion, it is my opinion that it is legally permissible for the President to assert constitutionally based privilege in these circumstances.

JACK L. GOLDSMITH III  
*Assistant Attorney General*  
*Office of Legal Counsel*

## Status of the Foreign Claims Settlement Commission

The Foreign Claims Settlement Commission is subject to the Attorney General's direction in administrative matters, except where that direction would interfere with the Commission's independence in adjudicating claims.

February 20, 2004

### MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

Your office has asked for our opinion whether the Foreign Claims Settlement Commission (“Commission”) is subject to the Attorney General's direction in administrative matters. We believe that it is subject to such direction, except where that direction would interfere with the Commission's independence in adjudicating claims.<sup>1</sup>

#### I.

The Commission consists of a Chairman and two members, who are appointed by the President with the Senate's advice and consent and serve staggered three-year terms. 22 U.S.C. § 1622c(a)–(c) (2000). It has “jurisdiction to receive, examine, adjudicate, and render a final decision with respect to any claim of the Government of the United States or of any national of the United States” under “claims agreement[s] . . . between the Government of the United States and a foreign government . . . providing for the settlement and discharge of claims” that the United States or its nationals have against the foreign government. 22 U.S.C. § 1623(a)(1)(B) (2000).

The Commission itself, although it had institutional predecessors, was established by Reorganization Plan 1 of 1954, 68 Stat. 1279, *codified at* 22 U.S.C. § 1622 note (“Reorganization Plan”), and continued as a free-standing entity until 1980. At that time, it was “transferred to the Department of Justice as a separate agency within that Department.” 22 U.S.C. § 1622a (2000), *codifying* Pub. L. No. 96-209, § 101, 94 Stat. 96, 96 (1980); *see also* 28 C.F.R. § 0.128 (2003) (organization of Commission).

Under the terms of the transfer, “[a]ll functions, powers, and duties of the [Commission] are . . . transferred with the Commission.” 22 U.S.C. § 1622b (2000). In addition, “[a]ll functions, powers, and duties not directly related to adjudicating claims are . . . vested in the Chairman, including the functions set forth in section 3 of Reorganization Plan 1 of 1954 and the authority to issue rules

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<sup>1</sup> We address only the statutory question of the Attorney General's administrative control and do not consider the President's authority to supervise the Commission or any constitutional issues that would arise to the extent the Commission might be insulated from control by the President.

and regulations.” *Id.* § 1622e (2000). The “functions” in that section of the Reorganization Plan are:

all functions of the Commission with respect to the internal management of the affairs of the Commission, including but not limited to functions with respect to: (a) the appointment of personnel employed under the Commission, (b) the direction of employees of the Commission and the supervision of their official activities, (c) the distribution of business among employees and organizational units under the Commission, (d) the preparation of budget estimates, and (e) the use and expenditure of funds of the Commission available for expenses of administration.

Reorganization Plan § 3.

The Attorney General “shall provide necessary administrative support and services to the Commission.” 22 U.S.C. § 1622f (2000). Although the Chairman must follow the Department of Justice’s procedures in preparing “budget requests, authorization documents, and legislative proposals,” the Attorney General is to “submit these items to the Director of the Office of Management and Budget as proposed by the Chairman.” *Id.*

The Attorney General has no power to review the Commission’s decisions on claims: “The decisions of the Commission with respect to claims shall be final and conclusive on all questions of law and fact, and shall not be subject to review by the Attorney General or any other official of the United States or by any court by mandamus or otherwise.” *Id.* § 1622g (2000). Moreover, nothing in the statute transferring the Commission to the Department “shall be construed to diminish the independence of the Commission in making its determinations on claims in programs that it is authorized to administer.” *Id.*

Shortly after the Commission’s transfer to the Department, the Commission and the Justice Management Division began what turned out to be a continuing dispute about whether the Department could exercise administrative control over the Commission. The Assistant Attorney General for Administration seems to have argued in 1980 that the Commission “is subject to the administrative procedures and policies of the Department,” but the Commission found “this conclusion . . . contrary to the plain language of [the statute transferring the Commission to the Department] as well as its legislative history.” Memorandum from the Foreign Claims Settlement Commission of the United States, *Re: Relationship Between the Department of Justice and the Foreign Claims Settlement Commission* at 1 (undated) (“Undated Commission Memorandum”) (describing Memorandum for Richard W. Yarborough, Chairman, Foreign Claims Settlement Commission, from Kevin D. Rooney, Assistant Attorney General for Administration, *Re: Relationship Between the Department of Justice and the Foreign Claims Settlement Commission* (April 22, 1981)). The dispute recurred in 1996, when the Commis-

sion disputed the Justice Management Division's assertion that its Chairman needed to obtain authorization from the Department before undertaking foreign travel.<sup>2</sup> In 2001, the issue arose again, in the context of determining the "employing agency" that may approve a Commission employee's receipt of a decoration under the Foreign Gifts and Decorations Act, 5 U.S.C. § 7342(d) (2000).<sup>3</sup> The immediate issue about acceptance of a foreign gift or decoration was resolved by the Deputy Attorney General's delegating to the Commission's Chairman the power to grant the approval of the "employing agency" with respect to all officers or employees of the Commission except the Chairman himself. *See* Memorandum for the Deputy Attorney General, from Janis A. Sposato, Acting Assistant Attorney General for Administration, *Re: Receipt of a Polish-Government Decoration* at 3 (Sept. 28, 2001) (signature on approval line). At your office's request, the larger issue of the Department's administrative authority over the Commission was then referred to our Office. *See* Memorandum for Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, from Janis A. Sposato, Acting Assistant Attorney General for Administration, *Re: Authority of Foreign Claims Settlement Commission* (Jan. 31, 2002).

## II.

We addressed a closely similar issue in *Attorney General's Authority with Respect to the Regulatory Initiatives of the U.S. Parole Commission*, 14 Op. O.L.C. 139 (1990) ("1990 Opinion"). For reasons discussed below, we reaffirm the validity of that opinion. The statutes governing the United States Parole Commission ("USPC") and the Commission are so similar as to require treating the two entities alike for purposes of the question here.

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<sup>2</sup> Memorandum for Mark Rodeffer, Finance Staff, Justice Management Division, from David E. Bradley, Chief Counsel, Foreign Claims Settlement Commission, *Re: Foreign Travel by the Chair, Foreign Claims Settlement Commission* (Feb. 2, 1996); Memorandum for Stephen R. Colgate, Assistant Attorney General for Administration, from Stuart Frisch, General Counsel, Justice Management Division, *Re: Travel Authorizations for the Chairmen of the Foreign Claims Settlement Commission and U.S. Parole Commission* (July 8, 1997).

<sup>3</sup> *See* Memorandum for the Deputy Attorney General, from David E. Bradley, Chief Counsel, Foreign Claims Settlement Commission, *Re: Proposed Acceptance of Decoration from the Ministry of Finance of the Government of Poland* (Aug. 21, 2001); Memorandum for Janis A. Sposato, Acting Assistant Attorney General for Administration, from Stuart Frisch, General Counsel, Justice Management Division, *Re: Authorization for [an Employee of] the Foreign Claims Settlement Commission to Receive and Retain a Polish-Government Decoration* (Aug. 31, 2001); Memorandum for the Deputy Attorney General, from John R. Lacey, Chairman, Richard T. White, Commissioner, and Laramie F. McNamara, Commissioner, Foreign Claims Settlement Commission, *Re: Delegation of Approval Authority Under the Foreign Gifts and Decorations Act* (Dec. 12, 2001) ("2001 Commission Memorandum").

A.

We described the USPC in the 1990 Opinion:

The Commission was established in 1976 as “an independent agency in the Department of Justice.” The legislative history of the Act that created the Commission states that Congress intended the Commission to be “independent for policy-making purposes” but that the Commission would be “attached to the Department of Justice for administrative convenience.” Indeed, the Conference Report on the bill stated that “[t]he Commission is attached to the Department solely for administrative purposes.” Congress granted the Commission independence from the Department because it wanted to ensure that “parole decisionmaking [would] be independent of, and not governed by, the investigative and prosecutorial functions of the Department of Justice.”

14 Op. O.L.C. at 141 (citations and parenthetical quotations omitted). In the 1990 Opinion, we considered the extent of the Attorney General’s authority in light of these provisions and, in particular, whether the Attorney General could “require the [USPC] to consult the Office of Policy Development (‘OPD’) concerning the [USPC’s] regulatory initiatives and to submit proposed regulations to OPD in advance of their submission to OMB’s Office of Information and Regulatory Affairs (‘OIRA’).” *Id.* at 139. We concluded that “the Attorney General has the authority to require the [USPC], as an administrative unit of the Department of Justice, to coordinate its regulatory activities with OPD and other components of the Department,” but that “[t]he [USPC’s] statutory status as an ‘independent agency’ within the Department . . . precludes the Attorney General as a general matter from asserting substantive control over the [USPC’s] policy-making, including its issuance of regulations.” *Id.* at 139–40.

Ordinarily, the placement of an agency “within” the Department of Justice would subject the agency to the Attorney General’s administrative direction. By statute, the Attorney General “is the head of the Department of Justice.” 28 U.S.C. § 503 (2000). With certain exceptions, “[a]ll functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General,” *id.* § 509, and he may make “such provisions as he considers appropriate” to authorize other officers, employees, and agencies of the Department to carry out the functions vested in him, *id.* § 510. *See also* 5 U.S.C. § 301 (2000) (empowering the head of a department to “prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property”). These provisions, in almost all circumstances, grant the Attorney General both administrative and substantive

control over the Department and the agencies within it. See Memorandum for Philip B. Heymann, Deputy Attorney General, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Creation of the Office of Investigative Agency Policies* at 2 (Oct. 26, 1993) (“Congress specifically granted broad powers to the Attorney General, vesting in her virtually all the functions within the Department, and authorizing her to delegate any of her authorities.”) (citations omitted); Memorandum for D. Lowell Jensen, Associate Attorney General, from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel at 2 n.1 (Aug. 23, 1983) (advisory commission located in the Department of Justice for administrative purposes). Although the 1990 Opinion did not explicitly refer to these provisions, they formed the evident background to our conclusion that “[b]ecause the [USPC] remains ‘attached’ to the Department for administrative purposes . . . the Attorney General may require the [USPC] to participate in Department-wide regulatory coordination that does not entail substantive control of the [USPC’s] regulatory initiatives.” 14 Op. O.L.C. at 142.

Congress has dealt, in some detail, with the administrative powers of both the USPC and the Commission, and the powers conferred in both cases are quite similar. The statute on the USPC provides that its Chairman, among other things, may hire personnel, including for temporary and intermittent services, 18 U.S.C. § 4204(a)(2), (b)(3) (repealed prospectively by Continuing Appropriations—Comprehensive Crime Control Act of 1984, tit. II, § 218(a)(5), 98 Stat. 1837, 2027); “assign duties among officers and employees . . . so as to balance the workload and provide for orderly administration,” *id.* § 4204(a)(3); “direct the . . . use of funds made available to the [USPC],” *id.* § 4204(a)(4); “enter into and perform such contracts, leases, cooperative agreements, and other transactions as may be necessary in the conduct of the functions of the [USPC],” *id.* § 4204(b)(1); and accept voluntary services, *id.* § 4204(b)(2). Similarly, the statute governing the Commission enables it to hire personnel, including consultants and language experts, and to accept facilities, services, and reimbursed details from other agencies. 22 U.S.C. § 1622d (2000). It vests in the Chairman “[a]ll functions, powers, and duties not directly related to adjudicating claims,” including functions set forth in the Reorganization Plan, *id.* § 1622e. The Reorganization Plan, through this incorporation by reference, places under the Chairman’s control “the internal management of the affairs of the Commission,” including “the direction of employees of the Commission and the supervision of their official activities” and “the use and expenditure of funds of the Commission available for expenses of administration.” Reorganization Plan § 3.

In the case of the USPC, we did not interpret the specific provisions on administrative authority as generally displacing the Attorney General’s authorities under 28 U.S.C. §§ 509 and 510 and 5 U.S.C. § 301.<sup>4</sup> The conferral of specific authori-

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<sup>4</sup> Although the 1990 Opinion addresses only one specific case of administrative control, its conclusions are more general. In a footnote to the conclusion that the USPC’s being attached to the

ties on the constituent part of the Department, without more, did not mean that the same authority was not vested in the Attorney General under section 509. Because the Commission, too, is “within” the Department, *see* 22 U.S.C. § 1622a, the same principle would apply here, unless some valid ground for distinction between the Commission and the USPC can be found.<sup>5</sup>

## B.

When the legislation that transferred the Commission to the Department was being drafted, we wrote a bill comment stating that the “relationship of the Commission to the Department is similar to that provided for the United States Parole Commission, which is attached to the Department of Justice solely for administrative purposes.” Memorandum for Michael Dolan, Office of Legislative Affairs, from Larry A. Hammond, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Draft Bill to Transfer the Foreign Claims Settlement Commission of the United States to the Department of Justice* (Jan. 24, 1979) (citations omitted) (“1979 Bill Comment”). There are, however, four principal arguments for the view that the two entities are dissimilar in administrative matters.

First, according to the Undated Commission Memorandum,

The Department of Justice conclusion that administration of the Commission rests with the Attorney General rather than the Chairman rests apparently on the thesis that the Congress intended the same authority in the Chairman of the [Commission] as was granted by legislation creating the Parole Commission. A comparison of the two statutes shows such conclusion to be totally without support. No where [sic] in the statute does Congress vest in the Parole Commis-

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Department for administrative purposes subjects it to Department-wide requirements for coordination, the 1990 Opinion notes that “Congress has expressly provided, however, that the Commission’s budgetary requests shall be separate from those of any other component of the Department.” 14 Op. O.L.C. at 142 n.4 (citation omitted). The plain implication is that the conclusion about the Attorney General’s power reaches other administrative matters, with budgetary requests being an express exception.

<sup>5</sup> Regulations issued by the Department in 1981 appear to have treated the Commission as subject to the Attorney General’s direction in administrative matters. A delegation of the Attorney General’s authority to the Deputy Attorney General, which listed components reporting to the Deputy Attorney General, provided that “[t]he Foreign Claims Settlement Commission is under the supervision of the Deputy Attorney General for administrative purposes.” 46 Fed. Reg. 52,339, 52,341 (1981) (issuing 28 C.F.R. § 0.15(b)). Although the regulation elsewhere used the term “supervision and direction,” *see id.*, the omission of “direction” was not consequential for present purposes, since the relationship of the Attorney General to the Deputy Attorney General was also described as one of “supervision.” *See id.* at 52,341 (“[s]ubject to the general supervision of the Attorney General”). The regulation was amended in 1988 to remove the specification of the units under the Deputy Attorney General and to substitute a general reference to the Deputy Attorney General’s “direct[ing] the activities of organizational units as assigned.” 53 Fed. Reg. 5370 (1988) (amending 28 C.F.R. § 0.15(b)).

sion or its Chairman the broad powers vested in the Chairman of the [Commission] by section 105 of Public Law 96-209.

*Id.* at 4. Section 105 is the provision under which “[a]ll functions, powers, and duties not directly related to adjudicating claims are hereby vested in the Chairman.” But although the statute on the USPC does not use the “[a]ll functions” formulation, it does state that the Chairman “shall . . . exercise such other powers and duties and perform such other functions as may be necessary to carry out the purposes of this chapter,” 18 U.S.C. § 4204(a)(7), and this catch-all appears, in practical effect, as broad as the provision to which the Undated Commission Memorandum points. The Chairman of the USPC, therefore, does not have appreciably narrower administrative authorities than the Chairman of the Commission, and the two entities cannot be distinguished on such a ground. Moreover, even before the Commission was transferred to the Department, “all functions of the Commission with respect to the internal management of the affairs of the Commission” were “vested in the Chairman.” Reorganization Plan § 3. Accordingly, the evident purpose for vesting authority in the Chairman was not to exclude the authority of the Attorney General, but to set the relative roles of the Chairman and the other members of the Commission.

Second, under 22 U.S.C. § 1622f, “[t]he Chairman shall prepare the budget requests, authorization documents, and legislative proposals for the Commission within the procedures established by the Department of Justice, and the Attorney General shall submit these items to the Director of the Office of Management and Budget as proposed by the Chairman.” Thus, the Commission argues, “although [the statute] . . . refers to ‘procedures established by the Department of Justice,’ it limits the applicability of those only to ‘budget requests, authorization documents, and legislative proposals.’” 2001 Commission Memorandum at 3. At least as to budget requests, the Commission’s statute is hardly different from the USPC’s. By statute, the USPC’s appropriations requests “shall be separate from those of any other agency of the Department of Justice.” 18 U.S.C. § 4203(a)(3). In 1977, we construed this provision as protecting the USPC’s ability to request whatever amount it considered necessary for its operations, but not as precluding the Department from insisting on “the administrative mechanics of the budgetary submission procedure implemented by the Department of Justice on the instructions of the Office of Management and Budget.” Memorandum for James S. Jardine, Special Assistant to the Attorney General, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Interpretation of 18 U.S.C. 4203(a)(3), the Budgetary Authority of the United States Parole Commission* at 2 (Oct. 27, 1977). In both cases, therefore, the special protections for the agency’s budget requests, as limited by the procedural requirements, are virtually identical.

More generally, by making the Commission subject to certain administrative controls over the form of budget requests, authorization documents, and legislative

proposals, the Commission's statute does not imply that the Commission is otherwise outside such controls. The statute supplies an additional, specific protection for the Commission's requests in these areas, which are closely tied to its substantive work, and the reference to the Department's procedures serves to set the limits of this additional protection. The draft version of the legislation transferring the Commission that we reviewed in 1979 appears to have provided that the Attorney General could attach his recommendations to the Commission's budget requests, *see* 1979 Bill Comment at 1, and we "suggest[ed] that the Commission be authorized to submit its budget request without review and recommendations of the Attorney General in order to avoid undermining its independence from the Department." We specifically offered the similar provision for the Parole Commission as a model. *Id.* The specific treatment of the procedures, budgets and similar matters should not be taken to imply that, in other areas not touching so directly on the Commission's substantive work, the Attorney General lacks administrative control over the Commission.

Third, "the paramount purpose of the 1980 act [transferring the Commission to the Department] was to streamline the Executive Branch by reducing the number of free-standing, individual agencies in it," and "[t]here is no suggestion anywhere in the [committee] report of any intent to reduce the [Commission] Chairman's administrative autonomy." 2001 Commission Memorandum at 4. But, assuming that the legislative purpose was to streamline the executive branch, it might be perfectly consistent with that purpose for the Commission and its Chairman to be placed under the Attorney General's administrative control. If, for example, the Commission no longer maintained separate approval mechanisms for various administrative matters, its integration into the Department's mechanisms could promote consistency and allow the application of the expertise arising from the Department's more extensive experience.<sup>6</sup>

Fourth, the Commission's statute provides that "[t]he Attorney General shall provide necessary administrative support and services to the Commission." 22 U.S.C. § 1622f. The requirement, in mandatory language, that the Attorney General provide administrative support and services arguably conflicts with the idea that the Commission, from an administrative standpoint, is sufficiently like other entities within the Department of Justice to be subject to the Attorney General's administrative control. Those entities, as a matter of course, receive administrative support as directed by the Attorney General and his delegates. The statutory requirement for the Attorney General to provide administrative support to the Commission might seem to bespeak a more distant relationship. However, while provisions requiring that one entity or official support another usually apply to

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<sup>6</sup> We take no position, of course, on such issues as whether the Attorney General might want to delegate approval authorities to the Commission. The point is that Congress could have considered that the transfer of the Commission would increase efficiency by providing for the Commission to be integrated, as appropriate, into the Department's administrative mechanisms.

entities that are administratively distinct, *see, e.g.*, 21 U.S.C. § 1908(d)(3) (2000) (the Attorney General and Treasury Secretary provide a legislative-branch commission “such administrative services, funds, facilities, and other support services as are necessary for the performance of the Commission’s duties”); 21 U.S.C. § 1704(c) (2000) (Administrator of General Services Administration is to provide Director of Office of National Drug Control Policy “such administrative support services as the Director may request”), they are not invariably found in that context, *see* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 811(a)(1)(A), 110 Stat. 1214, 1312 (1996) (using particular identified funds, the Attorney General is to “provide support and enhance the technical support center and tactical operations of the Federal Bureau of Investigation”); 28 U.S.C. § 586(c) (2000) (United States Trustees are under the “general supervision of the Attorney General, who shall provide general coordination and assistance” to them). The provision on administrative support clarifies that, despite the Commission’s being a “separate agency” with the Department, 22 U.S.C. § 1622a, and its having separate authority over budgetary matters, *id.* § 1622f, the Attorney General may make available to the Commission the administrative resources of the Department. This clarification does not undermine the Attorney General’s authority over the Commission in administrative matters.

### C.

To be sure, administrative control by the Attorney General in some cases could interfere with the substantive independence of the Commission, and, in those cases in which it would, we would not conclude that the Attorney General could exercise such control. As the 1990 Opinion shows, however, procedural requirements do not necessarily trench upon an agency’s substantive independence. 14 Op. O.L.C. at 142. We therefore cannot accept the categorical view that the independence of the Commission in its adjudicatory functions implies a similar independence from administrative controls.

M. EDWARD WHELAN III  
*Principal Deputy Assistant Attorney General*  
*Office of Legal Counsel*

## Liability of Contractors in Airbridge Denial Programs

A contractor ordinarily will not be criminally liable for assisting in certain foreign government programs for the aerial interdiction of illegal narcotics traffic.

March 1, 2004

### MEMORANDUM OPINION FOR THE DEPUTY LEGAL ADVISER DEPARTMENT OF STATE

You have asked for our opinion about the circumstances in which a contractor may be criminally liable for assisting in certain foreign government programs for the aerial interdiction of illegal narcotics traffic.<sup>1</sup> We believe that a contractor ordinarily will not be liable for providing such assistance.<sup>2</sup>

#### I.

In 1994, we advised the Deputy Attorney General on the lawfulness of certain forms of United States Government (“USG”) assistance to the Republics of Colombia and Peru. *United States Assistance to Countries That Shoot Down Civil Aircraft Involved in Drug Trafficking*, 18 Op. O.L.C. 148 (1994) (“1994 Opinion”). The 1994 Opinion concluded that the Aircraft Sabotage Act of 1984, which makes it a crime “willfully [to] destroy[] a civil aircraft registered in a country other than the United States while such aircraft is in service or cause[] damage to such an aircraft which renders that aircraft incapable of flight or which is likely to endanger that aircraft’s safety in flight,” 18 U.S.C. § 32(b)(2) (1994), generally applies to government actors, including the police and military personnel of foreign governments. 1994 Opinion, 18 Op. O.L.C. at 153–55.<sup>3</sup> Moreover, the criminal prohibition can apply even if no United States aircraft was involved and even if the act was not committed in this country. *Id.* at 152–53.

The 1994 Opinion advised that there was a “substantial risk that USG personnel who furnish assistance to the aerial interdiction programs of those countries could

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<sup>1</sup> Letter for M. Edward Whelan III, Acting Assistant Attorney General, from Samuel Witten, Deputy Legal Adviser, Department of State (Aug. 4, 2003) (“State Department Letter”).

<sup>2</sup> The Criminal Division concurs in this analysis.

<sup>3</sup> The Opinion concluded, however, that section 32(b)(2) implicitly recognizes certain defenses that are presumed to be available as to criminal prohibitions generally. 18 Op. O.L.C. at 163. In particular, section 32(b)(2) does not “criminaliz[e] actions by military personnel that are lawful under international law and the laws of armed conflict.” *Id.* at 164. The Opinion noted that application of section 32(b)(2) to such cases “could readily lead to absurdities.” *Id.* In addition, “even in cases in which the laws of armed conflict are inapplicable,” section 32(b)(2) would not apply to actions taken by an officer who “reasonably believes that the aircraft poses a threat of serious physical harm” to the officer or another person where the threat is “direct and immediate” and “no reasonably safe alternative would dispel that threat.” 1994 Opinion, 18 Op. O.L.C. at 164–65; *cf. United States v. Bailey*, 444 U.S. 394, 409–10 (1980).

be aiding and abetting criminal violations of the Aircraft Sabotage Act.” *Id.* at 149 (citing 18 U.S.C. § 2(a)). The 1994 Opinion also cautioned that, absent certain preventive steps, “United States aid to Colombia and Peru might also implicate USG personnel in those governments’ shutdown policies on a conspiracy rationale.” *Id.* at 160–61 (citing 18 U.S.C. § 371 (1994)). To address these concerns, the 1994 Opinion recommended that the USG take certain steps. The risk that provision of aid to Colombia or Peru would fall within the criminal prohibition on aiding or abetting in 18 U.S.C. § 2(a) could be averted by obtaining a “reliable assurance . . . that the foreign government would carry out no shutdowns falling within the prohibition of § 32(b)(2).” *Id.* at 159. If the foreign government refused to give such an assurance, the USG would need to insist on a number of conditions designed to ensure that, in shooting down civil aircraft, the foreign government would use no assistance that had come from the USG. *Id.* at 160. Furthermore, the USG could “make [its] disapproval of shutdowns in violation of section 32(b) clear in order to eliminate any suggestion that USG personnel have entered into a conspiratorial agreement with foreign officials involving unlawful shutdowns,” and “USG agencies should specifically instruct their personnel not to enter into any agreements or arrangements with the officials or agents of foreign governments that encourage or condone shutdowns.” *Id.* at 161–62.

In October 1994, in response to the Executive Branch’s articulation of the scope of section 32(b), as reflected in the 1994 Opinion, Congress enacted an express exception to any criminal culpability under federal law for certain law-enforcement shutdowns. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 1012, 108 Stat. 2663, 2837 (1994) (codified at 22 U.S.C. § 2291-4 (1994)). This exception, as later amended, provides that employees and agents of a foreign country engaged in interdictions, under specified circumstances, are not liable for shooting down civil aircraft:

Notwithstanding any other provision of law, it shall not be unlawful for authorized employees or agents of a foreign country (including members of the armed forces of that country) to interdict or attempt to interdict an aircraft in that country’s territory or airspace if—

- (1) that aircraft is reasonably suspected to be primarily engaged in illicit drug trafficking; and
- (2) the President of the United States has, during the 12-month period ending on the date of the interdiction, certified to Congress with respect to that country that—
  - (A) interdiction is necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of that country; and

(B) the country has appropriate procedures in place to protect against innocent loss of life in the air and on the ground in connection with interdiction, which shall at a minimum include effective means to identify and warn an aircraft before the use of force directed against the aircraft.

22 U.S.C. § 2291-4(a) (2000 & Supp. II 2003).<sup>4</sup> If the conditions specified as to foreign personnel are met, agents and employees of the United States are not liable for assisting the foreign personnel who shoot down the aircraft:

Notwithstanding any other provision of law, it shall not be unlawful for authorized employees or agents of the United States (including members of the Armed Forces of the United States) to provide assistance for the interdiction actions of foreign countries authorized under subsection (a) of this section. The provision of such assistance shall not give rise to any civil action seeking money damages or any other form of relief against the United States or its employees or agents (including members of the Armed Forces of the United States).

*Id.* § 2291-4(b) (2000). Accordingly, when an aircraft is “reasonably suspected to be primarily engaged in illicit drug trafficking” and the President of the United States has determined prior to the interdiction that, with respect to a country, interdiction is “necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of that country,” and that the country “has appropriate procedures in place to protect against innocent loss of life,” *id.* § 2291-4(a)(1)–(2), the employees and agents of the foreign government and the USG employees and agents who assist them are guilty of no crime as a result of interdicting the aircraft in that foreign country’s territory or airspace.

In December 1994, the President made the requisite findings with regard to the Republics of Colombia and Peru, Presidential Determination No. 95-7, 3 C.F.R. 1046 (1995) (Colombia); Presidential Determination No. 95-9, 3 C.F.R. 1047 (1995) (Peru). However, after the Government of Peru in April 2001 accidentally shot down a plane carrying missionaries, the USG suspended its assistance to both countries. The program for Colombia has now been resumed, and programs for other countries could conceivably follow. You have asked us to examine the possible liability of contractors, engaged by the USG or the foreign government, who offer assistance in the conduct of an “airbridge denial program” meeting the standards of the exception in section 2291-4.

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<sup>4</sup> The term “interdict” means “to damage, render inoperative, or destroy the aircraft.” 22 U.S.C. § 2291-4(d)(1) (Supp. II 2003).

## II.

We begin with what should be the exceptional case: where the foreign government is conducting an airbridge denial program that the President has certified under 22 U.S.C. § 2291-4, but an employee or agent of the foreign government nonetheless shoots down a plane in violation of 18 U.S.C. § 32(b). For example, if a foreign government pilot willfully shoots down an aircraft that is not reasonably suspected of being primarily engaged in illegal drug trafficking, the question to be decided is whether a contractor who has given assistance for the interdiction (for example, by supplying and maintaining the radar used in the interdiction) could be liable as aiding and abetting the crime or conspiring to commit it. We start with the exceptional case because it allows us to set out the principles that govern the liability of accessories to crimes. With that background, we then will turn to the usual case, in which a civil aircraft is shot down but the interdiction is lawful because of the exception in 22 U.S.C. § 2291-4.

### A.

In 1909, Congress enacted a general aiding and abetting statute, which has since been amended and codified as 18 U.S.C. § 2(a) (2000) and now provides: “Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.” Section 2(a) does not create an independent substantive offense, but instead provides that accessories are to be treated and punished as though they were principals. In other words, it eliminates the common-law distinction between principals in the first degree, principals in the second degree, and accessories before the fact. *See Standefer v. United States*, 447 U.S. 10, 19 (1980); *United States v. Superior Growers Supply, Inc.*, 982 F.2d 173, 177–78 (6th Cir. 1992).<sup>5</sup> As the Supreme Court has noted, section 2(a) declares that “those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing the crime.” *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 181 (1994) (citing *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949)). As this formulation suggests, and as the plain terms of section 2(a) require, an accessory is culpable under section 2(a) only if the government proves that the underlying offense was, in fact, committed (although the government need not prove the actual identity of the principal).<sup>6</sup>

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<sup>5</sup> Under 18 U.S.C. § 3 (2000), accessories after the fact are guilty of a separate offense and suffer lesser punishment.

<sup>6</sup> *See, e.g., United States v. Branch*, 91 F.3d 699, 732 (5th Cir. 1996); *United States v. Hill*, 55 F.3d 1197, 1204–05 (6th Cir. 1995); *Superior Growers*, 982 F.2d at 178; *United States v. Horton*, 921 F.2d 540, 543–44 (4th Cir. 1990); *United States v. Campa*, 679 F.2d 1006, 1013 (1st Cir. 1982).

The critical question for present purposes is the type of scienter that section 2(a) requires for accessory culpability. “In order to aid and abet another to commit a crime it is necessary that a defendant ‘in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.’” *Nye & Nissen*, 336 U.S. at 619 (quoting *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938)); see also 1994 Opinion, 18 Op. O.L.C. at 156.<sup>7</sup> The accessory must provide the assistance with the specific intent of aiding the commission of the offense. Because, as we said in 1994, “[t]he contours of this element in the definition of aiding and abetting are not without ambiguity,” *id.* at 157, and because the Department has addressed the issue of aider and abettor culpability in its *Report on the Availability of Bombmaking Information, the Extent to Which Its Dissemination is Controlled By Federal Law, and the Extent to Which Such Dissemination May Be Subject to Regulation Consistent With the First Amendment to the United States Constitution, Submitted to the United States House of Representatives and the United States Senate* at 20–21 (April 29, 1997) (“Bombmaking Information Report”), available at <http://cryptome.org/abi.htm> (last visited June 6, 2013), we believe that further elaboration upon the discussion we offered in the 1994 Opinion is appropriate.

In its discussion of culpability under section 2(a) in connection with the provision of bombmaking information, the Department’s Bombmaking Information Report explained:

[T]he aider must not only know that her assistance will be in the service of a crime; she also must share in the criminal intent. The defendant must “participate in [the venture] as in something that he wishes to bring about, that he seek by his action to make it succeed.” *Nye & Nissen*, 336 U.S. at 619 (quoting *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938)). As Judge Hand explained in the seminal *Peoni* case, the intent standard for criminal aiding and abetting is not the same as the “natural consequences of one’s act” test that is the touchstone for “intent” in the civil tort context; criminal intent to aid the crime has “nothing whatever to do with the probability that the forbidden result [will] follow upon the accessory’s conduct.” *Peoni*, 100 F.2d at 402. Rather, the aider must have a “purposive attitude” toward the commission of the offense. *Id.*

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<sup>7</sup> The question of an accessory’s scienter may be somewhat different where the underlying offense does not require purposive conduct, such as where the necessary state of mind for commission of the underlying offense is recklessness or negligence, or where the statute imposes strict liability. See 2 Wayne R. LaFare & Austin W. Scott, Jr., *Substantive Criminal Law* § 6.7(e), at 149–52 (1986); see generally Audrey Rogers, *Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent*, 31 Loy. L.A. L. Rev. 1351 (1998). Because section 32(b)(2) is not such an offense, we need not here consider such questions.

Bombmaking Information Report at 19 (footnote omitted). The report accordingly concluded that section 2(a) “generally would not prohibit or punish the dissemination of bombmaking information in the case where the disseminator does not have the specific purpose of facilitating a crime but nevertheless knows that a particular recipient thereof intends to use it for unlawful ends.” *Id.* at 26. The following conclusions regarding the scienter element of aiding and abetting liability are consistent with the Bombmaking Information Report:

- (i) the scienter element requires that the aider actually “seek by his action to make [the crime] succeed,” *id.* at 19;
- (ii) while the aider’s knowledge (or suspicion) that aid will be (or is likely to be) used to commit crimes may be relevant to the evidentiary question of whether the actor purposively assisted the crime, such knowledge is not dispositive of the question of shared purpose, *id.*; and
- (iii) it should not, for purposes of section 2(a), automatically be presumed that an aider “intends” the “natural consequences” of his acts, *id.*

As the Department explained in the Bombmaking Information Report, before the Court’s decision in *Nye & Nissen* there had been a growing debate in the lower courts on whether section 2(a) required purposive assistance, particularly in the case where a person knows, or strongly suspects, that aid he or she provides in the ordinary course of conduct or business will be used to commit a criminal offense.<sup>8</sup> It was the view of Judge Learned Hand that “purposive attitude” was essential, and that aiding and abetting under section 2(a) has “nothing whatsoever to do with the probability that the forbidden result would follow upon the accessory’s conduct.” *Peoni*, 100 F.2d at 402; *accord id.* (arguing that the “natural consequence of [one’s] . . . act” principle, although germane to a civil case, is not the rule of criminal aiding and abetting culpability). As Judge Hand elaborated in *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.), *aff’d*, 311 U.S. 205 (1940):

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<sup>8</sup> As the Model Penal Code notes, “there are many and important cases” in this category, for example:

A lessor rents with knowledge that the premises will be used to establish a bordello. A vendor sells with knowledge that the subject of the sale will be used in the commission of a crime. A doctor counsels against an abortion during the third trimester but, at the patient’s insistence, refers her to a competent abortionist. A utility provides telephone or telegraph service, knowing it is used for bookmaking. An employee puts through a shipment in the course of his employment though he knows the shipment is illegal. A farm boy clears the ground for setting up a still, knowing that the venture is illicit.

Model Penal Code § 2.06 cmt. 6(c), at 316 (Official Draft & Revised Comments 1985).

In [*Peoni*] we tried to trace down the doctrine as to abetting and conspiracy, as it exists in our criminal law, and concluded that the seller's knowledge was not alone enough. Civilly, a man's liability extends to any injuries which he should have apprehended to be likely to follow from his acts. If they do, he must excuse his conduct by showing that the interest which he was promoting outweighed the dangers which its protection imposed upon others; but in civil cases there has been a loss, and the only question is whether the law shall transfer it from the sufferer to another. There are indeed instances of criminal liability of the same kind, where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome.

That view was challenged, most prominently by Judge John J. Parker in *Backun v. United States*, 112 F.2d 635 (4th Cir. 1940). In dicta in that case, Judge Parker wrote:

Guilt as an accessory depends, not on "having a stake" in the outcome of crime. . . . The seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale of merchandise. One who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun.

*Id.* at 637.

In *Nye & Nissen*, the Court, quoting *Peoni*, 100 F.2d at 402, held that "[i]n order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'" 336 U.S. at 619 (emphasis added). More recently, in *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164 (1994), the Court reaffirmed *Nye & Nissen*. In *Central Bank*, the government argued that section 2(a) was pertinent authority for applying a "recklessness" standard for civil aiding and abetting liability under section 10(b) of the Securities and Exchange Act, 15 U.S.C. § 78j(b) (1994). The Court rejected that argument, in part on the ground that the government's reliance on section 2(a) was "inconsistent" with its argument that a recklessness standard should govern:

Criminal aiding and abetting liability under § 2(a) requires proof that the defendant “in some sort associate[d] himself with the venture, that he participate[d] in it as in something that he wishe[d] to bring about, that he [sought] by his action to make it succeed.” *Nye & Nissen*, 336 U.S., at 619 (internal quotation marks omitted). But recklessness, not intentional wrongdoing, is the theory underlying the aiding and abetting allegations in the case before us.

511 U.S. at 190.<sup>9</sup>

With respect to culpability for aiding and abetting under section 2(a), then, the general question under the *Peoni* test is whether an individual “[sought] by his action to make [the crime] succeed,” *Nye & Nissen*, 336 U.S. at 619 (internal quotation marks and citation omitted), *i.e.*, whether the individual “knowingly did some act for the purpose of [aiding] . . . the commission of that crime,” and whether the defendant “acted with the intention of causing the crime charged to be committed.” 1 Edward J. Devitt et al., *Federal Jury Practice & Instructions* § 18.01, at 693 (4th ed. 1992) (brackets in original).

A portion of our 1994 Opinion states a rule that appears to go beyond the scienter requirement of section 2(a) as analyzed above. The 1994 Opinion suggests that “USG agencies and personnel may not provide information (whether ‘real-time’ or other) or other USG assistance (including training and equipment) to Colombia or Peru in circumstances in which there is a reasonably foreseeable possibility that

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<sup>9</sup> Moreover, the Court’s use of the *Peoni* standard in *Nye & Nissen* has led the courts of appeals to adopt that standard. *See, e.g., United States v. Teffera*, 985 F.2d 1082, 1086 (D.C. Cir. 1993); *United States v. de la Cruz-Paulino*, 61 F.3d 986, 998 (1st Cir. 1995); *United States v. Campa*, 679 F.2d 1006, 1010 (1st Cir. 1982); *United States v. Best*, 219 F.3d 192, 199–200 (2d Cir. 2000); *United States v. Jenkins*, 90 F.3d 814, 821 (3d Cir. 1996); *United States v. Bey*, 736 F.2d 891, 895 (3d Cir. 1984); *Rice v. Paladin Enters.*, 128 F.3d 233, 251 (4th Cir. 1997) (dictum) (quoting *Peoni*, 100 F.2d at 402, and characterizing *Nye & Nissen* as “adopting Judge Hand’s view of the criminal intent requirement”); *United States v. Horton*, 921 F.2d 540, 543 (4th Cir. 1990); *United States v. Richeson*, 825 F.2d 17, 21 (4th Cir. 1987); *United States v. Branch*, 91 F.3d 699, 730 (5th Cir. 1996); *United States v. Jaramillo*, 42 F.3d 920, 923–24 (5th Cir. 1995); *Rattigan v. United States*, 151 F.3d 551, 557–58 (6th Cir. 1998); *United States v. Hill*, 55 F.3d 1197, 1201–02 (6th Cir. 1995); *United States v. Sewell*, 159 F.3d 275, 278 (7th Cir. 1998); *United States v. Simpson*, 979 F.2d 1282, 1288 (8th Cir. 1992); *United States v. Carranza*, 289 F.3d 634, 642 (9th Cir.), *cert. denied*, 537 U.S. 1037 (2002); *United States v. Vasquez-Chan*, 978 F.2d 546, 552 (9th Cir. 1992); *United States v. Sanchez-Mata*, 925 F.2d 1166, 1169 (9th Cir. 1991); *United States v. McMahon*, 562 F.2d 1192, 1195 (10th Cir. 1977); *United States v. Howard*, 13 F.3d 1500, 1502 (11th Cir. 1994); *cf.* Model Penal Code § 2.06(3)(a)(ii) & cmt. 6(c), at 296, 313–19 (recommending the adoption of the equivalent of the *Peoni* standard in criminal codes). Some panel decisions of the Seventh Circuit analyze the scienter requirement of section 2(a) in a manner that could be construed to be in tension with one or more aspects of the *Nye & Nissen/Peoni* rationale, *see United States v. Fountain*, 768 F.2d 790, 797–98 (7th Cir. 1985); *United States v. Zafiro*, 945 F.2d 881, 887–88 (7th Cir. 1991), *aff’d on other grounds*, 506 U.S. 534 (1993); *United States v. Ortega*, 44 F.3d 505, 508 (7th Cir. 1995); *see also United States v. Irwin*, 149 F.3d 565, 569–76 (7th Cir. 1998); but an en banc decision of the Seventh Circuit indicates that the *Peoni* rule is the governing law in that circuit as well. *See United States v. Piño-Perez*, 870 F.2d 1230, 1235 (7th Cir. 1989) (en banc) (“We and other courts have endorsed Judge Learned Hand’s definition of aiding and abetting . . .”).

such information or assistance will be used in shooting down civil aircraft, including aircraft suspected of drug trafficking.” 18 Op. O.L.C. at 162. As far as section 2(a) is concerned, however, a person could be culpable as an aider and abettor only if he provided aid to a foreign nation with the purpose of helping an unlawful shutdown succeed.<sup>10</sup>

Applying the test for aiding and abetting liability, we turn to the question whether a contractor could be liable when the government it has assisted engages in an unlawful shutdown. Under the applicable test, a contractor would aid and abet a violation of section 32(b)(2) only if he sought by his aid to make the unlawful interdiction succeed.<sup>11</sup>

There is no definitive test for determining when circumstantial evidence would warrant an inference of the requisite scienter. The nature of the assistance and its relation to the underlying crime, as well as the gravity of the crime, may be pertinent in determining whether the aider sought to make the unlawful shutdown succeed. For example, if the crime is particularly grave, the assistance is essential (in the sense that without it the crime could not be committed and the principal could not readily obtain the assistance from another source), and the particular type of assistance cannot easily be (and is not typically) put to lawful use, it may be reasonable to infer that the facilitator harbored the necessary intent to satisfy

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<sup>10</sup> It is unclear whether the language in the 1994 Opinion regarding any “reasonably foreseeable possibility” of the unlawful use of the aid could be understood in light of the particular factual background presented there and the concomitant risk that the relevant facts might have been susceptible to an inference of purposive facilitation. *See* 18 Op. O.L.C. at 162. In particular, the 1994 Opinion observed that certain “USG personnel [had] been fully engaged in the air interdiction operations of each country, providing substantial assistance that . . . contributed in an essential, direct and immediate way” to the ability of the countries at issue “to shoot down civil aircraft.” *Id.* at 158. Under certain factual scenarios, a finder of fact might have been warranted in finding the requisite scienter for purposes of section 2(a). Moreover, we concluded in the 1994 Opinion that in the shutdown context, because the issue is an individual’s intent, aiding and abetting culpability could not definitively be negated simply by virtue of an official announcement that the USG was opposed to any violations of section 32(b)(2), and, in particular, that the USG was opposed to the use of USG aid in unlawful shutdowns. *Id.* at 157–58. To be sure, such clear statements, combined with unambiguous instructions to USG personnel never to provide aid for the purpose of facilitating unlawful shutdowns, would have helped to minimize the likelihood of a judicial finding of impermissibly motivated facilitation where aid provided by USG personnel did, in fact, assist a foreign nation in an unlawful shutdown. *Cf. id.* at 161–62 (advice concerning mitigation of risk of prosecution for unlawful conspiracy). But in particular cases, circumstantial evidence might still have permitted an inference that particular USG personnel, contrary to announced government policy, had provided aid for the purpose of facilitating unlawful shutdowns. Occasionally, “aid rendered with guilty knowledge [that it will be used unlawfully] implies purpose since it has no other motivation.” Model Penal Code § 2.06 cmt. 6(c), at 316. We need not try to resolve such issues here.

<sup>11</sup> We should stress, however, that this test does not depend upon the accessory’s ultimate motive. If the person sought by his actions to increase the likelihood that an unlawful shutdown succeed, it does not matter why he wished to facilitate the shutdown—for instance, because of a desire to retain amicable relations with the foreign country.

the *Peoni* standard.<sup>12</sup> See *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943) (“While [intent to further the unlawful scheme] is not identical with mere knowledge that another purposes unlawful action, it is not unrelated to such knowledge.”).

Particularly as to lawful uses of assistance, there is a critical difference between the circumstances of the 1994 Opinion and the circumstances in which a contractor would act now. Now, under specified conditions, the foreign government can lawfully interdict civil aircraft reasonably suspected of being primarily engaged in illegal drug trafficking, whereas in 1994 it could not do so. The circumstances, therefore, do not naturally suggest the possibility that those providing assistance for the airbridge denial program share the purpose of conducting illegal interdictions. On the contrary, the more natural inference, absent particular facts indicating otherwise, is that the contractor intends the assistance to be used in accordance with the rules of the program that the President has certified under 22 U.S.C. § 2291-4. Given such an intent, the contractor would not be guilty of aiding and abetting under 18 U.S.C. § 2(a).

## B.

The general conspiracy statute, 18 U.S.C. § 371 (2000), provides a criminal penalty “[i]f two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy.” As the Supreme Court has explained, “agreement remains the essential element of the crime [of conspiracy under 18 U.S.C. § 371], and serves to distinguish conspiracy from aiding and abetting which, although often based on agreement, does not require proof of that fact.” *Iannelli v. United States*, 420 U.S. 770, 777 n.10 (1975). In the 1994 Opinion, we considered whether a court “might . . . construe ongoing USG assistance [used to shoot down civil aircraft] as evidence of an agreement” that would amount to a conspiracy. 18 Op. O.L.C. at 161. We recommended that the USG “make [its] disapproval of shootdowns in

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<sup>12</sup> See, e.g., *Hill*, 55 F.3d at 1201, discussing who could be culpable under section 2(a) for aiding and abetting an unlawful gambling business:

[I]t is quite obvious that bettors should not be held criminally liable either under the [substantive] statute or under § 2 and that local merchants who sell the accounting paper or the computers on which bets are registered are not sufficiently connected to the enterprise to be included even if they know that their goods will be used in connection with the work of the business. On the other hand, it seems similarly obvious that the seller of computer hardware or software who is fully knowledgeable about the nature and scope of the gambling business would be liable under § 2 if he installs the computer, electronic equipment and cables necessary to operate a “wire shop” or a pari-mutuel betting parlor, configures the software programs to process betting information and instructs the owners of the gambling business on how to use the equipment to make the illegal business more profitable and efficient. Such actions would probably be sufficient proof that the seller intended to further the criminal enterprise.

violation of § 32(b) clear in order to eliminate any suggestion that USG personnel have entered into a conspiratorial agreement with foreign officials.” *Id.* at 161–62. We also recommended that “USG agencies should specifically instruct their personnel not to enter into any agreements or arrangements with the officials or agents of foreign governments that encourage or condone shootdowns.” *Id.* at 162 (citation omitted).

Once again, the significant difference between the present circumstances and those in 1994 is that, under 22 U.S.C. § 2291-4, a foreign government may maintain a lawful program in which certain civil aircraft are shot down. A contractor who supplies assistance for interdictions, but does not agree to the use of the assistance for unlawful shootdowns, is not guilty of conspiracy. Ordinarily, moreover, if a contractor is providing assistance for a lawful program, and a pilot or other participant in the foreign government’s chain of command in that program commits an act that leads to an illegal shootdown, there will be no reason for a finder of fact to infer that the contractor had agreed to assist in that unlawful act. The reasonable inference, absent facts to the contrary, would be that the contractor, far from agreeing to an illegal use of its assistance, intended that the assistance would be used in accordance with the program that has been certified.<sup>13</sup>

### III.

We now turn to, and can briefly dispose of, what should be the more usual case, in which a contractor’s assistance is used for lawful interdictions.

Section 2291-4 declares that, when the conditions of a Presidential determination and reasonable suspicion of drug trafficking have been met, “it shall not be unlawful for authorized employees or agents of a foreign country . . . to interdict or attempt to interdict an aircraft in that country’s territory or airspace,” and “it shall not be unlawful for authorized employees or agents of the United States . . . to provide assistance for the interdiction actions.” 22 U.S.C. § 2291-4(a), (b). When these provisions apply, they rule out a contractor’s liability for aiding and abetting. The statute on aiding and abetting provides: “Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.” 18 U.S.C. § 2(a). As the Supreme Court has explained, and as we noted above, section 2(a) declares that “those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime.” *Central Bank*, 511 U.S. at 181 (citing *Nye & Nissen*, 336 U.S. at 619). An accessory thus may be culpable under section 2(a) only if the government proves that the underlying offense was, in fact, committed. *See, e.g., United States v. Branch*, 91 F.3d 699, 732 (5th Cir. 1996); *United States v. Hill*, 55 F.3d 1197, 1204–05 (6th Cir. 1995);

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<sup>13</sup> We do not address any possible application of 18 U.S.C. § 2339A, which deals with the provision of material support in connection with a variety of offenses, including 18 U.S.C. § 32.

*Superior Growers*, 982 F.2d at 178; *United States v. Horton*, 921 F.2d 540, 543–44 (4th Cir. 1990); *United States v. Campa*, 679 F.2d 1006, 1013 (1st Cir. 1982). Here, however, under section 2291-4, the action that the contractor has assisted “shall not be unlawful,” and there is no underlying offense that the contractor could aid and abet.<sup>14</sup>

Nor would the lawful interdiction of a civil aircraft create any liability for a contractor under 18 U.S.C. § 371. Because there would be no agreement “to commit any offense against the United States,” the contractor could not be guilty of an unlawful conspiracy under 18 U.S.C. § 371.

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*Office of Legal Counsel*

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<sup>14</sup> In some circumstances, a contractor might be an “agent” of the United States or the foreign government and thus covered directly by the language in 22 U.S.C. § 2291-4 declaring that the specified actions by “authorized employees or agents” are not unlawful. In view of our discussion in the text, we need not resolve the question of the circumstances under which a contractor would be an “agent.”

## Apportionment of False Claims Act Recoveries to Agencies

Whether an agency's revolving fund is entitled to receive from a False Claims Act recovery (in addition to single damages equal to the actual amount of the payment made as a result of the false claim) pre-judgment or pre-settlement interest on that payment and investigative and administrative costs attributable to the false claim depends on whether the fund is authorized to borrow money at interest, earn interest on its own investments, and pay its own investigative and administrative expenses.

March 12, 2004

MEMORANDUM OPINION FOR THE GENERAL COUNSEL  
OFFICE OF PERSONNEL MANAGEMENT  
AND THE GENERAL COUNSEL  
U.S. POSTAL SERVICE

This memorandum addresses what portions, beyond single damages, of a monetary settlement or judgment awarded the United States under the False Claims Act ("FCA") can be received by the agency that paid the false claim from a revolving fund.<sup>1</sup> Our opinion responds to separate requests submitted to this Office for our opinion concerning (1) whether the Employees Health Benefits Fund ("OPM Fund") administered by the Office of Personnel Management ("OPM") may receive a portion of an FCA recovery representing lost interest,<sup>2</sup> and (2) whether the Postal Service Fund administered by the U.S. Postal Service ("Postal Service") may receive the entirety of such a recovery.<sup>3</sup> Both opinion requests concern false claims resulting in payments from revolving funds operated by the agencies in question.

As discussed below, we conclude that whether a revolving fund is entitled to receive (in addition to single damages equal to the actual amount of the payment made as a result of the false claim) pre-judgment or pre-settlement interest on that payment and investigative and administrative costs attributable to the false claim depends on whether the fund is authorized to borrow money at interest, earn

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<sup>1</sup> This opinion is limited to the revolving fund context and does not address the distribution of FCA recoveries where the false claim was paid from agency appropriations. In preparing this opinion, this Office has consulted with the Civil Division, which litigates False Claims Act cases involving false claims submitted to agencies of the government. The Civil Division has not submitted written views, but has reviewed this opinion and concurs in its conclusions and analysis.

<sup>2</sup> See Letter for Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, from Janice R. Lachance, Director, U.S. Office of Personnel Management (Jan. 18, 2001).

<sup>3</sup> See Memorandum for Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, from Robert D. McCallum, Jr., Assistant Attorney General, Civil Division, *forwarding* Letter for Stephen D. Altman, Assistant Director, Civil Fraud, Civil Division, from Eric Scharf, Managing Counsel, Civil Practice Section, U.S. Postal Service (Feb. 7, 2002).

interest on its own investments, and pay its own investigative and administrative expenses. Because the Postal Service Fund is authorized to borrow money at interest, to earn interest on its investments, and to pay investigative and other administrative expenses from the fund, it is entitled to receive from the FCA recovery pre-judgment or pre-settlement interest it paid or interest it failed to earn as a result of the false claim, as well as investigative and administrative costs attributable to the false claim. This conclusion also applies to the OPM Fund, except that because the OPM Fund is not authorized to borrow funds, OPM may receive amounts allocable to interest only to the extent that the Fund was earning interest at the time the false claim was paid and so long as it continues to earn interest. Neither agency may receive any portion of an FCA recovery that does not reflect actual loss to its Fund but instead represents multiple damages or penalties.

## I.

Under the False Claims Act, a person who submits a false claim “is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person,” except that only double damages are assessed if certain conditions set forth in the statute are met. 31 U.S.C. § 3729(a) (2000). The Civil Division’s practice has been to allocate only single damages to the agencies. OPM and the Postal Service believe they are entitled to a greater share of FCA recoveries.

OPM argues that it is entitled to receive not just single damages but also interest on that amount representing either the interest not earned by the OPM Fund because of the payment made on the false claim or the interest to be paid by the OPM Fund if it was operating under a deficit and had to borrow from the Treasury in order to make the payment. OPM acknowledges that money received by the government must generally be deposited in the Treasury pursuant to the Miscellaneous Receipts Act (“MRA”), 31 U.S.C. § 3302 (2000), but argues that single damages and interest may be credited to the OPM Fund based on the “refund to appropriations” exception to the MRA requirement. The Postal Service makes the same argument, but in addition argues that the Postal Service Fund should also recover its investigative and administrative costs.<sup>4</sup>

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<sup>4</sup> The Postal Service also argues, more broadly, that the Fund should receive the entirety of the FCA recovery because the Postal Service is exempt from the MRA, and even if it is not exempt, the Service has been specifically authorized by statute to collect penalties and therefore the Fund should receive the rest of an FCA recovery beyond single damages because those multiple damages constitute penalties. We do not believe that those arguments are available to the Postal Service in the FCA context because the recovery in a FCA suit is payable to the United States, 31 U.S.C. § 3729(a) (“Any person who [submits a false claim] is liable to the United States Government”), not to individual agencies. Thus, it is beside the point that the Postal Service itself might be exempt from the MRA or might be authorized itself to collect penalties. The question presented by this opinion is limited to whether and to what ex-

Under the MRA, “an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.” 31 U.S.C. § 3302(b). The Executive Branch and the Comptroller General have construed the MRA to provide an exception for “refunds to appropriations.” Treasury Department–General Accounting Office Joint Regulation No. 1, § 2(b) (Sept. 22, 1950) (“Treasury Department–GAO Joint Regulation”), *reprinted in* 30 Comp. Gen. 595 (defining, as one of two classes of “repayments to appropriations,” “[r]efunds to appropriations which represent amounts collected from outside sources for payments made in error, overpayments, or adjustments for previous amounts disbursed, including returns of authorized advances”). “The term ‘refund,’” in GAO practice, “embraces a category of mostly nonstatutory exceptions in which the receipt is directly related to, and is a direct reduction of, a previously recorded expenditure.” 2 General Accounting Office, *Principles of Federal Appropriations Law* 6-109 (2d ed. 1992) (“*Federal Appropriations Law*”).<sup>5</sup>

We agree with the Comptroller General’s opinion in *Matter of Federal Emergency Management Agency*, 69 Comp. Gen. 260 (1990) (“*FEMA*”), that, in the context of false claims paid out of a revolving fund operated by FEMA, the “collections for overpayments made” prong of the refund exception allows the agency to retain single damages.<sup>6</sup> *Id.* at 262. The Comptroller General also explained in *FEMA* that because the FEMA revolving fund earns interest on its investments, 12 U.S.C. § 1749bbb-13(b)(2) (2000), and may borrow money at interest from the Treasury, *id.* § 1749bbb-13(a)(3), a false claim results in “additional interest expense or reduced interest income.” 69 Comp. Gen. at 262.

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tent the “refund to appropriations” exception to the MRA is available to authorize the Civil Division, on behalf of the United States, to distribute FCA recoveries to agency accounts within the Treasury instead of the general fund of the Treasury. We express no opinion on the availability of these arguments to the Postal Service in any context other than the FCA context.

<sup>5</sup> We assume *arguendo* throughout this memorandum the correctness of the Comptroller General’s longstanding construction of the MRA, a construction that the Executive Branch has shared or at least acquiesced in. Two aspects of that construction are pertinent here. First, the MRA’s requirement that money be deposited “in the Treasury” has been understood to require a deposit in the *general fund* of the Treasury. 2 *Federal Appropriations Law* at 6-106. Second, the MRA’s mandate has been understood to be subject to a non-textual exception for “refunds to appropriations.” *Id.* at 6-109. A possible alternative interpretation of the MRA, however, would be that the MRA requires only what its text states—that miscellaneous receipts must go to the Treasury, but not to any particular fund or account in the Treasury. Under this interpretation, decisions about where miscellaneous receipts are directed in the Treasury would be guided by the anti-augmentation principle (an agency may not augment its appropriations from outside sources without statutory authority) that GAO finds embedded in the MRA and other statutes, *see id.* at 6-103, but it would be understood that the principle is derived from the Constitution, not the MRA. You have not asked us to reconsider the longstanding construction of the MRA, and we express no opinion on it here.

<sup>6</sup> As we have repeatedly stated, the opinions and legal interpretations of the General Accounting Office and the Comptroller General often provide helpful guidance on appropriations matters and related issues, but are not binding upon departments, agencies, or officers of the Executive Branch.

We agree with the Comptroller General that this lost interest income is “a direct consequence of the false claims [the agency] paid and [increases] the magnitude of the losses the Fund suffered as a result of paying those claims.” *Id.* at 262–63.

## II.

We also agree with the Comptroller General that the agency should be reimbursed for “[a]ny administrative expenses that [the agency] charged the Fund in connection with making or recovering these erroneous payments.” *Id.* at 263. Not only are the administrative costs incurred in the processing of the false claim in the first instance clearly reimbursable, but in addition the agency’s recovery of the “administrative expenses in the course of investigating the validity of the false insurance claims submitted and in assisting in the preparation of this case for trial, all of which were paid from the Fund,” *id.*; 12 U.S.C. § 1749bbb-13(a)(2), would make the agency “whole at no additional expense to the taxpayer,” 69 Comp. Gen. at 263 (quoting *Matter of Bureau of Prisons*, 62 Comp. Gen. 678, 682 (1983)) (internal quotation marks omitted). Thus, allowing the agency to retain interest on single damages and the administrative costs of false claims would not be an improper augmentation of the agency’s appropriation and is consistent with the Treasury Department–GAO Joint Regulation.

The OPM and Postal Service Funds are both revolving funds. 5 U.S.C. § 8909(a) (2000) (authorizing payments both into and out of the OPM Fund with no fiscal year limitation); 39 U.S.C. §§ 2003(a)–(b) (2000) (same for Postal Service Fund). The OPM Fund is authorized to invest its money in interest-bearing obligations, the interest on which becomes part of the Fund. 5 U.S.C. § 8909(c). The OPM Fund is not authorized to borrow money at interest, but as long as the Fund is not in deficit during the period between the payment and the recovery of a false claim, the false claim results in lost interest income. The OPM Fund pays for administrative expenses “within the limitations that may be specified annually by Congress,” *id.* § 8909(a)(2), and in fact a portion of employee contributions is specifically set aside for such administrative expenses, *id.* § 8909(b)(1). The Postal Service Fund is also authorized to collect interest on its investments, 39 U.S.C. § 2003(b)(4), and may borrow money, *id.* § 2005(a) (2000), at interest, *id.* § 2005(c)(5), and “investigate postal offenses and civil matters relating to the Postal Service,” *id.* § 404(a)(7) (2000). Therefore, under the reasoning of the *FEMA* opinion, and consistent with the Treasury Department–GAO Joint Regulation, the OPM Fund and the Postal Service Fund may recover both interest income lost and administrative expenses incurred as a result of a false claim, and the Postal Service Fund may also recover interest paid as a result of the false claim.

**III.**

Finally, we agree with the Comptroller General's conclusion in *FEMA* that the agency could not receive any portion of the FCA recovery that represented an amount beyond actual losses to the agency, such as multiple damages or penalties. That amount would have to be remitted to the Treasury for deposit into the general fund. 69 Comp. Gen. at 264. We likewise conclude that neither the OPM Fund nor the Postal Service Fund may receive any amount of a FCA recovery that does not reflect actual loss to the fund but instead can only be viewed as multiple damages or a penalty.

M. EDWARD WHELAN III  
*Principal Deputy Assistant Attorney General  
Office of Legal Counsel*

## Deployment of United States Armed Forces to Haiti

The President has authority to order the deployment of the armed forces to Haiti in order to protect American citizens there.

The deployment is consistent with the War Powers Resolution.

March 17, 2004

### MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked our Office to confirm in writing our views about the legal basis for the President's recent deployment of the United States armed forces to Haiti. As we explain below, the President has the legal authority to order the deployment. The deployment is also consistent with the War Powers Resolution.

#### I.

Since early February of this year, an armed rebellion has sought to overthrow the government of Haitian President Jean-Bertrand Aristide. On February 23, President Bush deployed approximately 50 Marines to protect the United States Embassy in Port-au-Prince, Haiti, from political violence or looting. *See Letter to Congressional Leaders on the Deployment of U.S. Military Forces in Response to Security Concerns for United States Embassy Personnel in Haiti*, 40 Weekly Comp. Pres. Doc. 284 (Feb. 25, 2004).

On February 29, President Aristide announced his resignation and fled the country. The Chief Justice of the Haitian Supreme Court, Boniface Alexandre, was sworn in as the leader of a transitional government, as provided by the Haitian Constitution. S.C. Res. 1529, pmb., U.N. Doc. S/RES/1529, at 1 (Feb. 29, 2004) (“[t]aking note of the resignation of Jean-Bertrand Aristide as President of Haiti and the swearing-in of President Boniface Alexandre as the acting President of Haiti in accordance with the Constitution of Haiti”). He issued an appeal “to the governments of friendly countries to support with all urgency the peaceful and constitutional process which has begun” in Haiti. Statement of Haitian President Boniface Alexandre (Feb. 29, 2004). Specifically, he “authorize[d] security forces to enter and operate on the territory of the Republic of Haiti for the purpose of conducting activities designed to bring about a climate of security and stability which will support the political processes underway, facilitate the furnishing of humanitarian assistance, and in general help the people of Haiti.” *Id.*

On the day Aristide announced his departure, the United Nations Security Council adopted a resolution authorizing the deployment of a Multinational Interim Force in Haiti. S.C. Res. 1529, ¶ 2, U.N. Doc. S/RES/1529, at 2 ¶ 2. The resolution authorized the force to “contribute to a secure and stable environment in the Haitian capital and elsewhere in the country” in order to “facilitate the

provision of humanitarian assistance and the access of international humanitarian workers to the Haitian people in need” and to “facilitate the provision of international assistance to the Haitian police and the Haitian Coast Guard in order to establish and maintain public safety and law and order and to promote and protect human rights.” *Id.* ¶ 2(a)–(c), U.N. Doc. S/RES/1529, at 2 ¶ 2(a)–(c). The same day, President Bush announced that he was “order[ing] the deployment of Marines, as the leading element of an interim international force, to help bring order and stability to Haiti.” *Remarks on the Resignation of President Jean-Bertrand Aristide of Haiti*, 40 Weekly Comp. Pres. Doc. 310 (Feb. 29, 2004). France, Canada, and Chile have also deployed troops to Haiti.

## II.

The President has the authority to deploy the armed forces abroad in order to protect American citizens and interests from foreign threats. Under Article II, Section 2 of the Constitution, the President is the “Commander in Chief of the Army and Navy of the United States.” U.S. Const. art. II, § 2, cl. 1. Article II also makes the President the Chief Executive. The Supreme Court has “recognized ‘the generally accepted view that foreign policy [is] the province and responsibility of the Executive.’” *Dep’t of Navy v. Egan*, 484 U.S. 518, 529 (1988) (quoting *Haig v. Agee*, 453 U.S. 280, 293–94 (1981)).

History offers ample evidence for the proposition that the President may take military action abroad, even, as here, in the absence of specific prior congressional authorization. See Richard F. Grimmett, Cong. Research Serv., RL30172, *Instances of Use of United States Armed Forces Abroad, 1798–2001* (updated Feb. 5, 2002). Many of these actions have been undertaken to protect American citizens and property. As Attorney General Robert Jackson explained, “the President’s authority has long been recognized as extending to the dispatch of armed forces outside of the United States, either on missions of good will or rescue, or for the purpose of protecting American lives or property or American interests.” *Training of British Flying Students in the United States*, 40 Op. Att’y Gen. 58, 62 (1941). Similarly, the Supreme Court observed in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), that “[t]he United States frequently employs Armed Forces outside this country—over 200 times in our history—for the protection of American citizens or national security.” *Id.* at 273.

For example, in *Durand v. Hollins*, 8 F. Cas. 111 (C.C.S.D.N.Y. 1860) (No. 4186), an American naval officer acting under orders from President Pierce bombarded Greytown, Nicaragua, in retaliation for the Nicaraguan government’s refusal to make reparations for attacks against United States citizens and property. In ruling on a lawsuit brought against the naval officer, Justice Nelson held that the officer acted properly. He observed that “the interposition of the president abroad, for the protection of the citizen, must necessarily rest in his discretion.” *Id.* at 112. More recently, we explained in the context of the Iranian hostage crisis that

“the President has the constitutional power as Chief Executive and Commander-in-Chief to protect the lives and property of Americans abroad.” *Presidential Powers Relating to the Situation in Iran*, 4A Op. O.L.C. 115, 121 (1979). Similarly, we concluded in 1992 that the President had authority to deploy the armed forces to Somalia to protect “private United States citizens engaged in relief operations, and United States military personnel conducting humanitarian supply flights.” *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 6, 10 (1992).

In light of these principles, the President has authority to order the deployment of the armed forces to Haiti in order to protect American citizens there. See Department of Defense News Briefing: Secretary Rumsfeld and General Myers (Mar. 1, 2004), available at <http://www.defense.gov/transcripts/archive.aspx> (last visited May 31, 2013) (Defense Secretary Rumsfeld stating that the mission of the forces deployed to Haiti is in part “to protect U.S. citizens”). Thousands of Americans live in Haiti,<sup>1</sup> and the President could reasonably conclude that they would be in danger if the country were to descend into lawlessness. He also could reasonably decide that the deployment is necessary to protect American property, such as the United States Embassy in Haiti.

When the armed forces are deployed for the protection of American citizens and property, their mission once deployed need not be so narrowly limited. As we explained in our opinion on the Somalia deployment, “[p]ast military interventions that extended to the protection of foreign nationals provide precedent for action to protect endangered Somalians and other non-United States citizens.” *Military Forces in Somalia*, 16 Op. O.L.C. at 11. For example, in 1965 President Johnson ordered military intervention in the Dominican Republic “to preserve the lives of American citizens and citizens of a good many other nations.” *An Assessment of the Situation in the Dominican Republic*, 53 Dep’t St. Bull. 19, 20 (1965). And during the Boxer Rebellion in China, President McKinley sent United States troops as part of a multinational force to lift the siege of the foreign quarters in Beijing. See *Compilation of the Messages and Papers of the Presidents, 1789–1902*, Supplement 113, 115–20 (James A. Richardson ed., 1904).

The President also may determine that the deployment is necessary to protect American foreign policy interests. One such interest is the preservation of regional stability. As we noted in our opinion on the introduction of armed forces into Bosnia, the President may employ the armed forces to protect an American interest in “preserving peace in the region.” *Proposed Deployment of United States Armed Forces Into Bosnia*, 19 Op. O.L.C. 327, 332 (1995). Given the proximity of Haiti to the United States, the United States has an obvious interest in maintaining peace and stability in that country. This is especially so because past instances of

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<sup>1</sup> According to the website of the United States Embassy in Haiti, “[a]pproximately 15,000 U.S. citizens are registered at the Consular Section, but many more are believed to reside in the country.” See <http://usembassy.state.gov/haiti/wwwhc00e.html> (last visited Mar. 4, 2004).

unrest in Haiti have led to the mass emigration of refugees attempting to reach the United States. See Address to the Nation on Haiti, 2 *Pub. Papers of Pres. William J. Clinton* 1558, 1559 (Sept. 15, 1994) (President Clinton stated that his 1994 deployment of troops to Haiti was appropriate because in the absence of intervention, “[w]e will continue to face the threat of a mass exodus of refugees and its constant threat to stability in our region and control of our borders”); see also *Letter to Congressional Leaders on the Further Deployment of United States Military Forces in Haiti*, 40 *Weekly Comp. Pres. Doc.* 317 (Mar. 2, 2004) (“*Further Deployment Letter*”) (noting that the deployment will “facilitate the continued repatriation of Haitian migrants”).

Another American interest in Haiti arises from the involvement of the United Nations in the situation there. In an opinion supporting President Truman’s decision to aid the United Nations in defending South Korea in 1950, the State Department observed that “[t]he continued existence of the United Nations as an effective international organization is a paramount United States interest.” *Authority of the President to Repel the Attack in Korea*, 23 *Dep’t St. Bull.* 173, 177 (1950). And in our opinion on the Somalia deployment, we noted that “maintaining the credibility of United Nations Security Council decisions, protecting the security of United Nations and related relief efforts, and ensuring the effectiveness of United Nations peacekeeping operations can be considered a vital national interest.” *Authority to Use United States Military Forces in Somalia*, 16 *Op. O.L.C.* at 11. In this case, the deployment will help to create the conditions in which a Multinational Interim Force, authorized by a United Nations Security Council Resolution, can be deployed to Haiti. See *Further Deployment Letter* at 317 (noting that the deployment will “help create conditions in the capital for the anticipated arrival of the Multinational Interim Force”). Of course, as Attorney General Barr noted in discussing the Somalia intervention, a Security Council resolution is “not required as a precondition for Presidential action.” *Authority to Use United States Military Forces in Somalia*, 16 *Op. O.L.C.* at 7. Nevertheless, in exercising his authority as Commander in Chief and Chief Executive, the President could choose to take the resolution into account in evaluating the foreign policy and national security interests of the United States that are at stake in Haiti.

### III.

The deployment of armed forces to Haiti is consistent with the War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973), *codified at* 50 U.S.C. §§ 1541–1548 (2000). Section 4(a) of the Resolution provides that the President “shall submit” a report to Congress within 48 hours whenever armed forces are introduced (1) “into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances,” (2) “into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such

forces,” or (3) “in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation.” 87 Stat. at 555–56. After the President reports the introduction of forces into imminent or actual hostilities under section 4(a)(1), the Resolution purports to require him to withdraw those forces within 60 days (or 90 days, based on military necessity) unless Congress has authorized continued operations. *Id.* § 5(b). This provision does not apply when the armed forces are introduced to a situation described in section 4(a)(2) or section 4(a)(3).

The War Powers Resolution does not purport to limit the President’s authority to deploy the armed forces without congressional authorization; on the contrary, it “recognizes and presupposes the existence of unilateral presidential authority to deploy armed forces ‘into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.’” *Deployment of United States Armed Forces Into Haiti*, 18 Op. O.L.C. at 175; *see also Proposed Deployment of United States Armed Forces Into Bosnia*, 19 Op. O.L.C. at 335. To be sure, the Resolution provides for reports by the President, but we understand that the President has already informed Congress of the deployment, thus satisfying any reporting requirement that may apply. *See Further Deployment Letter*.

At this time, we need not determine whether the situation in Haiti is one where “imminent involvement in hostilities is clearly indicated by the circumstances” within the meaning of the Resolution’s 60-day provision, or whether the War Powers Resolution is constitutional. But it is surely relevant to the question whether “involvement in hostilities” is “imminent” that the deployment is at the express invitation of the government of Haiti. And the departure of President Aristide creates at least some possibility that large-scale fighting between rebels and pro-Aristide forces may come to an end. Although it is also possible that some level of violence and instability will continue, we previously have concluded that “the term ‘hostilities’ should not be read necessarily to include sporadic military or paramilitary attacks on our armed forces.” *Presidential Power to Use Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185, 194 (1980).

We believe that the President has authority to order the deployment of the United States armed forces to Haiti for the purposes we have discussed.

JACK L. GOLDSMITH III  
*Assistant Attorney General*  
*Office of Legal Counsel*

## **“Protected Person” Status in Occupied Iraq Under the Fourth Geneva Convention**

The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (IV) governs the United States occupation of Iraq.

The following persons, if captured in occupied Iraq, are not “protected persons” within the meaning of article 4 of the Fourth Geneva Convention: U.S. nationals, nationals of a State not bound by the Convention, nationals of a co-belligerent State, and operatives of the al Qaeda terrorist organization who are not Iraqi nationals or permanent residents of Iraq.

March 18, 2004

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The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (“GC4”) provides “protected persons” with certain protections if they “find themselves” in occupied territory or in the home territory of a party to an armed conflict. *Id.* art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. You have sought guidance on whether various categories of persons captured by U.S. forces in occupied Iraq—and, in particular, al Qaeda operatives—have “protected person” status under GC4.

Part I of our opinion discusses the threshold issue of when GC4 “applies” to an armed conflict or occupation and concludes that GC4 governs the United States occupation of Iraq. Part II addresses GC4’s general criteria for determining

“protected person” status, as well as the categories of persons that GC4 clearly excludes from its definition of “protected persons.” Part III addresses the status of al Qaeda operatives in occupied Iraq. It concludes that al Qaeda operatives captured in occupied Iraq who are neither citizens nor permanent residents of Iraq are not entitled to “protected person” status.\*

## **I. The Scope of Coverage of the Fourth Geneva Convention**

GC4 does not apply to every conceivable armed conflict. Article 2 of GC4—an article that is worded identically to the corresponding provisions in each of the other three Geneva Conventions—contemplates only three circumstances in which the Geneva Conventions “apply”: (a) in “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties,” *id.* art. 2(1); (b) in “cases of partial or total occupation of the territory of a High Contracting Party,” *id.* art. 2(2); or (c) when a non-signatory “Power[] in conflict” “accepts and applies the provisions [of GC4],” *id.* art. 2(3).

The United States is currently involved in two armed conflicts that are relevant to our analysis: the armed conflict with and occupation of Iraq, and the armed conflict with al Qaeda. In this Part we analyze how article 2 applies to each conflict *considered independently*. This analysis is not conclusive as to how GC4 applies when the two conflicts become intertwined, as they may when al Qaeda operatives carry on their armed conflict against the United States in occupied Iraq. This latter issue is addressed in Part III, *infra*.

### **A. Armed Conflict With Iraq**

As this Office has previously explained, the armed conflict with Iraq began in January 1991 and continued beyond March 19, 2003, the date on which President Bush ordered United States military forces to invade Iraq in response to Iraq’s “material breach” of an earlier ceasefire agreement accepted by Iraq on April 6, 1991. *See* Exec. Order No. 13290, 68 Fed. Reg. 14,307 (Mar. 20, 2003) (determining that the United States and Iraq are “engaged in armed hostilities”); Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: The President’s Authority to Provide Military Equipment and Training to Allied Forces and Resistance Forces in Foreign Countries* at 2 (May 6, 2003) (determining that a state of armed conflict has existed between the United States and Iraq since January 1991).

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\* Editor’s Note: After this opinion was issued, the Supreme Court held in *Hamdan v. Rumsfeld*, 548 U.S. 557, 629–31 (2006), that common article 3 of the Geneva Conventions is applicable to the United States’ armed conflict with al Qaeda. *See infra* notes 5 & 20. We also note that the published version of this opinion omits a lengthy appendix (and a footnote referring to it) setting forth provisions of the Geneva Convention referred to in the opinion.

In the spring of 2003, the United States and its allies defeated the Iraqi forces. GC4 does not itself provide criteria for determining when the occupation of Iraq began. The rule under customary international law is that the United States is an occupying power over any Iraqi territory that is “actually . . . under the authority” of the United States. See Hans-Peter Gasser, *Protection of the Civilian Population, in The Handbook of Humanitarian Law in Armed Conflicts* 240–41, 243 (Dieter Fleck ed., 1999); *Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-T, Trial Judgment ¶¶ 338–39 (Feb. 26, 2001); see also Regulations Respecting the Laws and Customs of War on Land (“Hague Regulations”) art. 42(1), Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (annexed to Convention (IV) Respecting the Laws and Customs of War on Land) (same).<sup>1</sup> Applying this standard, the United States became an occupying power no later than April 16, 2003, the date on which General Tommy Franks announced the creation of the “Coalition Provisional Authority to exercise powers of government temporarily, and as necessary, especially to provide security, to allow the delivery of humanitarian aid and to eliminate weapons of mass destruction.” See Tommy R. Franks, *Freedom Message to the Iraqi People* (Apr. 16, 2003).<sup>2</sup>

Both the United States and Iraq have ratified GC4.<sup>3</sup> GC4 governs the armed conflict between the United States and Iraq because the conflict is one between “High Contracting Parties” under article 2(1). It also governs the U.S. occupation of Iraq, because the United States has occupied “the territory of a High Contracting Party” under article 2(2).<sup>4</sup> Cf. S.C. Res. 1483, ¶ 5, U.N. Doc. S/RES/1483

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<sup>1</sup> The Hague Regulations do not apply to the United States’ conflict with and occupation of Iraq as a matter of treaty law because Iraq is not a party to the Hague Convention. See Hague Regulations art. 2, 36 Stat. at 2290 (“The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.”); Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Authority of the President Under Domestic and International Law To Make Fundamental Institutional Changes to the Government of Iraq* at 10 (Apr. 14, 2003) (stating that “the Hague Regulations do not expressly govern the U.S. conflict with Iraq”). But as the citations in the text make clear, article 42(1) of the Hague Regulations, which provides that occupation begins “when [territory] is actually placed under the authority of the hostile army,” reflects customary international law.

<sup>2</sup> It is possible, either at present or in the future, that some areas in Iraq might not be sufficiently under the authority of the United States to satisfy this definition of “occupation.” We have not been asked to address the geographic scope of the United States’ “occupation” in this opinion, and our analysis applies only to the United States’ conduct in those areas of Iraq that are “actually . . . under the authority” of the United States.

<sup>3</sup> Iraq acceded to the Geneva Conventions on February 14, 1956, without reservations. See 2 Peter H. Rohn, *World Treaty Index* 553, 555, 557, 558 (2d ed. 1983).

<sup>4</sup> Some commentators have argued that article 2(2) refers *only* to occupations that (in the language of article 2(2)) “meet[] with no armed resistance.” See, e.g., *The Geneva Conventions of 12 August 1949, Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 21 (Jean S. Pictet ed., International Committee of the Red Cross 1958) (“ICRC Commentary on GC4”) (arguing that article 2(2) refers only to occupations that have occurred “without a declaration of

(May 22, 2003) (calling upon “all concerned [in Iraq] to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907”).

## **B. Armed Conflict With al Qaeda**

The United States is also engaged in an armed conflict with al Qaeda. *See* President’s Military Order of November 13, 2001, § 1(a), 66 Fed. Reg. 57,833 (“International terrorists, including members of al Qaeda, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.”); Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (authorizing the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons”); *Legality of the Use of Military Commissions to Try Terrorists*, 25 Op. O.L.C. 238, 260–61 (2001) (concluding that the President may properly determine that an “armed conflict” exists between the United States and al Qaeda.).

As we explain below, the drafters of the Geneva Conventions did not contemplate the possibility of an armed conflict between a State and an international non-State terrorist organization like al Qaeda. It is thus no surprise that, unlike the armed conflict with Iraq, the armed conflict with al Qaeda does not satisfy any of the article 2 prerequisites for the applicability of GC4. The President has previously determined that the conflict with al Qaeda does not satisfy article 2 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364 (“GPW”) because “Al-Qaida is not a state party to the Geneva Convention; it is a foreign terrorist group.” Office of the Press Secretary, The White House, *Fact Sheet: Status of Detainees at Guantanamo* (Feb. 7, 2002), *available at* <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html> (last visited on Mar. 17, 2004). This determination under article 2 of GPW applies fully to the identically worded article 2 in GC4. Nonetheless, it is useful to review why the

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war and without hostilities”); Adam Roberts, *What is a Military Occupation?*, 55 Brit. Y.B. Int’l L. 249, 253 (1984) (agreeing with ICRC). On this view, article 2(1) rather than article 2(2) would trigger the application of GC4 to occupations, like the one in Iraq, that grow out of an armed conflict, even though article 2(1) does not expressly refer to occupations following hostilities. *See* ICRC Commentary on GC4, *supra*, at 21 (arguing that article 2(1) applies to “cases in which territory is occupied during hostilities”); Roberts, *supra*, at 253 (agreeing). We need not decide whether this argument is valid. If it is, then the occupation of Iraq satisfies article 2(1) because it arose out of an armed conflict between contracting parties. If it is not, then the occupation of Iraq satisfies article 2(2) because, as stated in the text, it is an “occupation of the territory” of a contracting party.

armed conflict with al Qaeda does not satisfy article 2 and thus does not trigger the applicability of GC4.

The U.S.-al Qaeda armed conflict is not one “between two or more of the High Contracting Parties” within the meaning of article 2(1).<sup>5</sup> Al Qaeda has not signed or ratified GC4. Nor could it. Al Qaeda is not a State. Rather, it is a terrorist organization composed of members from many nations, with ongoing military operations in many nations. As a non-State entity, it cannot be a “High Contracting Party” to the Convention. *See* Bybee Memorandum, *supra* note 5, at 9. In addition, the U.S.-al Qaeda armed conflict has not resulted in the “occupation of the territory of a High Contracting Party” within the meaning of article 2(2). As a non-State actor, al Qaeda lacks any territory that could possibly be occupied. Finally, al Qaeda is not a “Power[] in conflict” that can “accept[] and appl[y]” GC4 within the meaning of article 2(3). *See, e.g.,* G.I.A.D. Draper, *The Red Cross Conventions* 16 (1958) (arguing that “in the context of Article 2, para. 3, ‘Powers’ means States capable then and there of becoming Contracting Parties to these Conventions either by ratification or by accession”); 2B *Final Record of the Diplomatic Conference of Geneva of 1949*, at 108 (explaining that article 2(3) would impose an “obligation to recognize that the Convention be applied to the non-Contracting adverse State, in so far as the latter accepted and applied the provisions thereof”) (emphasis added) (“*Final Record*”); ICRC Commentary on GC4, *supra* note 4, at 23 (using “non-Contracting State” interchangeably with “non-Contracting Power” and “non-Contracting Party”). And in any event, far from embracing GC4 or any other provision of the law of armed conflict, al Qaeda has consistently acted in flagrant defiance of the law of armed conflict.<sup>6</sup>

In sum, applying article 2 to the two conflicts, considered independently, we conclude that GC4 applies to the United States’ armed conflict with and occupation of Iraq but does not apply to its armed conflict with al Qaeda.

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<sup>5</sup> Nor does the United States’ conflict with al Qaeda implicate common article 3 of the Geneva Conventions, which governs “armed conflict[s] not of an international character occurring in the territory of one of the High Contracting Parties.” As we have previously explained, common article 3 applies only to purely internal armed conflicts. *See* Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* at 10 (Jan. 22, 2002) (“Bybee Memorandum”). *See also infra* note 20.

<sup>6</sup> For example, on September 11, 2001, nineteen al Qaeda operatives wearing civilian clothes hijacked commercial airliners and used them as weapons to target and kill thousands of U.S. civilians. More generally, Osama bin Laden has declared a jihad against the U.S. government that instructed his followers to target American civilians as well as military personnel, without regard for international law. *See* World Islamic Front Statement, *Jihad Against Jews and Crusaders* (Feb. 23, 1998), available at <http://www.fas.org/irp/world/para/docs/980223-fatwa.htm> (last visited on Feb. 26, 2004).

## II. “Protected Persons” in Occupied Territory

Once GC4 is deemed to “apply” to the armed conflict with and occupation of Iraq under article 2, article 4 of GC4 defines a class of “[p]ersons protected by the Convention.” “Protected person” status carries with it various protections set forth in part III of GC4.<sup>7</sup> In occupied territory, these protections relate to, among other things, detention, interrogation, trial, punishment, and deportation. *See, e.g.*, GC4 art. 76 (“Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein.”); *id.* art. 31 (“No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.”); *id.* art. 33 (“No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.”); *id.* art. 49 (“Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of motive.”). “Protected person” status under GC4 is not related to, and should not be confused with, “prisoner of war” (“POW”) status under GPW. Most notably, a “protected person” under GC4 who commits an act of hostility against opposing forces does not receive the “belligerent’s privilege” accorded to POWs who commit hostile acts against enemy forces before their capture. “Protected persons” can thus be tried, convicted, and (if appropriate) executed for such acts.

GC4’s general definition of “protected persons” is set forth in article 4(1):

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

The broad terms used in this definition suggest that persons located in the territory of occupied Iraq are “in the hands of” an occupying power and qualify for

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<sup>7</sup> Individuals who are ineligible for “protected person” status under GC4 may still receive the protections under part II of GC4 that are not contingent on one’s status as a “protected person.” *See id.* art. 4(3) (noting that the “provisions of Part II [of GC4] are . . . wider in application, as defined in Article 13”). Specifically, part II, which includes articles 13–26, “covers the whole of the populations of the countries in conflict, without any adverse distinction based . . . on race, nationality, religion or political opinion.” *Id.* art. 13. The protections in part II are primarily designed to protect persons from the adverse effects of hostilities, even in occupied territory. Among other things, part II concerns the establishment in occupied territory of hospitals and safety zones to shelter the wounded, the sick, children, young mothers, and the aged, *id.* arts. 14–15; requires belligerent parties to facilitate recovery of those killed or wounded, *id.* arts. 16–17; requires belligerent parties to protect civilian hospitals and related items and personnel, *id.* arts. 18–22; and confers some limited rights of communication upon the population of the occupied country, *id.* arts. 25–26.

“protected person” status so long as they “find themselves” there. See ICRC Commentary on GC4, *supra* note 4, at 47 (“The expression ‘in the hands of’ is used in an extremely general sense. . . . The mere fact of being in the territory of a Party to the conflict or in occupied territory implies that one is in the power or ‘hands’ of the Occupying Power.”). GC4 then establishes various exceptions and qualifications to this definition of “protected person” based on geography, nationality, or protection by another Geneva Convention. We consider these exceptions and qualifications below.

### A. Geographical Limitation

To receive the protections provided for “protected persons,” one must be located in either (1) “occupied territory,” or (2) the “territory of a party to the conflict.” This limitation does not emerge from article 4 itself, but rather from other provisions in GC4. Most notably, part III of GC4, which governs the “Status and Treatment of *Protected Persons*,” *id.* (title) (emphasis added), confers protections only on “Aliens” who find themselves “*in the Territory of a Party to the Conflict*,” *id.* pt. III, sec. II (title) (emphasis added), and persons who find themselves in “Occupied Territor[y],” *id.* pt. III, sec. III (title). See also *id.* pt. III, sec. I (title) (referring to “Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories”) (emphasis added); *id.* pt. III, sec. IV (title) (“Regulations for the Treatment of Internees”); *id.* art. 79 (specifying that the “Internees” governed by part III, section IV consist of “protected persons” that have been interned pursuant to the provisions of articles 41, 42, or 43 (in the territory of a party to the conflict) or the provisions of articles 68 and 78 (in occupied territory)). Article 5 tends to confirm this territorial nexus. In limiting the protections available to otherwise “protected persons” engaged in activities hostile to the security of the State, article 5 speaks only about persons detained “in the territory of a Party to the conflict” or in “occupied territory.” *Id.* art. 5(1), (2).<sup>8</sup>

The meaning of the phrase “territory of a Party to the conflict,” considered in isolation, is not self-evident. At first glance, one might think that the phrase includes occupied territory, because the occupied power (to whom the territory belongs) is a party to the conflict. But in the context of the entire Convention, the phrase clearly refers to the *home territory* of the party to the conflict in whose hands the “protected person” finds himself. This is evident from several provisions in GC4. Part III of GC4 sets forth the requirements for the “treatment of protected

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<sup>8</sup> Commentators agree that the protections accorded to “protected persons” exist only in the territory of a party to the conflict or in occupied territory. See ICRC Commentary on GC4, *supra* note 4, at 45–46; Richard R. Baxter, *So-Called “Unprivileged Belligerency”: Spies, Guerrillas, and Saboteurs*, 28 *Brit. Y.B. Int’l L.* 323, 328 (1951); Raymond T. Yingling & Robert W. Ginnane, *The Geneva Conventions of 1949*, 46 *Am. J. Int’l L.* 393, 411 (1952); John Embry Parkerson, Jr., *United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause*, 133 *Mil. L. Rev.* 31, 74 (1991).

persons,” and its provisions clearly demonstrate that the “territory of a party to the conflict” does not include “occupied territor[y].” First, part III of GC4 separates provisions governing the “Territory of a Party to the Conflict” from those governing “Occupied Territor[y].” See *id.* pt. III, sec. II (title) (“Aliens in the Territory of a Party to the Conflict”); *id.* pt. III, sec. III (title) (“Occupied Territor[y]”). See also *id.* pt. III, sec. I (title) (referring to “Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories”) (emphasis added). In addition, the rules that govern the “territory of a party to the conflict” are very difficult to reconcile with the obligations imposed on an occupying power by section III. Article 49(1), which is included in part III, section III’s rules for “Occupied Territories,” generally prohibits “forcible transfers, as well as deportations” of “protected persons.”<sup>9</sup> The provisions of part III, section II, by contrast, envision considerably more latitude in removing “protected persons” found in the “territory of a party to the conflict.” See, e.g., *id.* art. 45(3) (“Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention.”) (emphasis added); *id.* art. 45(5) (“The provisions of this Article do not constitute an obstacle to the extradition, in pursuance of extradition treaties concluded before the outbreak of hostilities, of protected persons accused of offences against ordinary criminal law.”). So any uncertainty about the phrase “territory of a party to the conflict” is eliminated by consideration of the clear distinctions drawn in the first three sections of part III.<sup>10</sup>

In sum, the protections afforded to “protected persons” by GC4 apply only to persons who “find themselves” in occupied territory or in the home territory of a party to the conflict.

## **B. Citizens of the Occupying Power**

The general definition of “protected person” in article 4(1) by its terms does not extend to persons who “find themselves . . . in the hands of” an occupying power that is the State of their nationality. In the context of U.S. obligations in occupied Iraq, this means that U.S. citizens in the hands of the U.S. government are not

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<sup>9</sup> Article 49(2) provides a limited exception to this rule:

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

<sup>10</sup> This point is so obvious that commentators assume it without discussion. See, e.g., ICRC Commentary on GC4, *supra* note 4, at 61–62; Yingling & Ginnane, *supra* note 8, at 417; Parkerson, *supra* note 8, at 73–74.

“protected persons.” Despite this exception to “protected person” status, article 70(2) of GC4 provides:

Nationals of the occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State, shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace.

U.S. nationals captured in Iraq who satisfy the requirements of article 70 receive its limited protections.

### **C. Nationals of a Non-Signatory State**

Article 4(2) provides that “[n]ationals of a State which is not bound by” GC4 are not “protected persons.” Almost every State in the world has ratified GC4. At present, we are aware of only two States that have not: the Marshall Islands and Nauru. *See* Office of the Legal Adviser, Dep’t of State, *Treaties in Force* 456–57 (2003) (listing States-Parties to the Geneva Conventions). In occupied Iraq, citizens of these States who “find themselves . . . in the hands of” the United States will not be “protected persons,” unless and until their State of citizenship agrees to be bound by GC4.

### **D. Nationals of a Co-Belligerent State**

Article 4(2) further excludes from “protected person” status “nationals of a co-belligerent State” that has “normal diplomatic representation in the State in whose hands they are.” GC4 does not define the term “co-belligerent.” At the time the Convention was being drafted, the term “belligerent” was commonly used to “designate[] either of two nations which are actually in a state of war with each other, as well as their allies actively co-operating, as distinguished from a nation which takes no part in the war and maintains a strict indifference as between the contending parties, called a ‘neutral.’” *Black’s Law Dictionary* 197 (4th ed. 1951); *see also* 1 *Oxford English Dictionary* 787 (1933) (defining “belligerent” as “[a] nation, party, or person waging regular war (recognized by the law of nations).”). The addition of the prefix “co-” distinguishes, in broad terms, allies from enemies. *See* ICRC Commentary on GC4, *supra* note 4, at 49 (stating that “co-belligerent[s]” and “allies” are synonyms); Michael Bothe et al., *New Rules for Victims of Armed Conflicts* 440 (1982) (characterizing article 4’s reference to “co-belligerents” as a reference to “allies”). This usage is consistent with a prominent episode during World War II. In 1943, when Italy surrendered to the allies and declared war on Germany, it was formally accepted as “a co-belligerent [with the

United States, Great Britain, and the Soviet Union] in the war against Germany.” Statement by the President of the United States, the Prime Minister of Great Britain, and the Premier of the Soviet Union on Italy’s Declaration of War, reprinted in 1943 U.S. Naval War College, *International Law Documents* 92 (1945).

The status of belligerency is not always easy to establish, however, because GC4 does not require that a state of armed conflict be formally “recognized” by the States involved. See GC4 art. 2(1). Because belligerent States are defined in contrast with neutral ones, neutrality law may provide guidance in determining when a State has become a co-belligerent. To remain neutral, a State must not actively participate in hostilities and (with exceptions not relevant here) must not permit its territory to be used by belligerents as a sanctuary or base of operations. See, e.g., Michael Bothe, *The Law of Neutrality*, in *The Handbook of Humanitarian Law in Armed Conflicts* ¶ 1109, at 495 (Dieter Fleck ed., 1999) (a neutral State “must prevent any attempt by a party to the conflict to use its territory for military operations”); *id.* ¶ 1111, at 497 (“If the neutral state takes part [in acts of war by a party to the conflict] by engaging its own military forces, this is a clear example” of forbidden assistance.); Yoram Dinstein, *War, Aggression and Self-Defence* 23-28 (3d ed. 2001) (similar). Prior U.S. practice is consistent with the conclusion that a country becomes a co-belligerent when it permits U.S. armed forces to use its territory for purposes of conducting military operations.<sup>11</sup>

For these reasons, the exception to “protected person” status for nationals of “co-belligerent[s]” in article 4 includes, at a minimum, nationals of countries that send military forces to participate in Coalition combat operations or that allow their territory to be used as a base for such operations. Applying this definition to Iraq, we conclude, based on information currently available to us, that the United Kingdom, Australia, Spain, Poland, Kuwait, and Qatar are “co-belligerent[s]” within the meaning of article 4.<sup>12</sup> This list is not meant to exclude other States that

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<sup>11</sup> In 1970, President Nixon ordered U.S. forces in Vietnam to cross the border into Cambodia to attack bases that—despite Cambodia’s professions of neutrality—were being used by North Vietnamese and Viet Cong forces. The State Department Legal Adviser explained that the United States affirmatively decided not to secure the “advance, express request of the Government of Cambodia for our military actions on Cambodian territory,” because that level of cooperation would have “compromised the neutrality of the Cambodian Government” and the United States “did not wish to see Cambodia become a co-belligerent along with South Viet-Nam and the United States.” *Military Operations in Cambodia*, 64 Am. J. Int’l L. 932, 935 (1970). President Nixon himself made the same point in connection with the simultaneous decision to provide equipment for the Cambodian Army. See Address to the Nation on the Situation in Southeast Asia, *Pub. Papers of Pres. Richard Nixon* 405, 407 (Apr. 30, 1970) (“[T]he aid we will provide will be limited for the purpose of enabling Cambodia to defend its neutrality and not for the purpose of making it an active belligerent on one side or the other.”).

<sup>12</sup> There should be no dispute that each of these States “has normal diplomatic representation” in the United States. GC4 art. 4(2). Each of them maintains an embassy in Washington, D.C., and (although this is not required by the text of article 4) the United States also maintains an embassy in each of their capitals.

may be in a similar position; it merely reflects the information currently available to this Office.

As for States that did not participate in actual combat operations in Iraq but that subsequently play some role in the occupation of Iraq, we have not located authority or analysis regarding the level of participation in an occupation that suffices to trigger “co-belligerent” status under GC4. We believe, however, that mere participation in any aspect of the occupation itself will not always suffice to constitute co-belligerency, especially when a State’s specific contribution has no direct nexus with belligerent or hostile activities. For instance, if a State merely assists the Coalition in fulfilling the requirement under article 50(1) of GC4 to “facilitate the proper working of all institutions devoted to the care and education of children,” it would not be a belligerent. But a State that sends military forces to assist in rounding up Baathist remnants and imposing general security in Iraq, and especially one that participates in hostile activities in Iraq, will engage in conduct properly characterized as belligerent. In sum, the determination whether a State is a “co-belligerent” by virtue of its participation in the occupation of Iraq turns on whether the participation is closely related to “hostilities.”

#### **E. Nationals of a Neutral State in the Territory of a Belligerent State**

Article 4(2) also excludes from “protected person[.]” status nationals “of a neutral State who find themselves in the territory of a belligerent State,” as long as the neutral State has “normal diplomatic representation in the State in whose hands they are.” The phrase “territory of a belligerent State” might appear at first to be capable of bearing two different readings. First, it might refer to the territory of any State that participates in an armed conflict covered by GC4. As applied to the armed conflict with Iraq, this interpretation would mean that citizens of neutral States in occupied Iraq would not be “protected persons” so long as the neutral States had “normal diplomatic representation” in the United States. Second, “territory of a belligerent State” might refer to the *home* territory of the party to the conflict in whose hands the citizen of the neutral State finds himself. As applied to the armed conflict with Iraq, this interpretation would deny “protected person[.]” status to citizens of neutral States who find themselves in the territory of the United States, but not to those who find themselves in occupied Iraq.

We conclude that the second interpretation is correct. The phrase “[n]ationals of a neutral State who find themselves in the territory of a belligerent State” must be understood in light of the Convention’s overarching structure. As noted earlier, the specific protections that the Convention confers on “protected persons” apply in only two places: in occupied territory, or in the home territory of a party to the conflict. *See supra* Part II.A. If “territory of a belligerent State” were construed to include occupied territory as well as the home territory of a party to the conflict, nationals of neutral States would not enjoy GC4’s protections *anywhere in the world*. Interpreting “territory of a belligerent State” to include occupied territory

would thus render this phrase effectively meaningless. Such a construction is disfavored. *See, e.g., Factor v. Laubenheimer*, 290 U.S. 276, 303–04 (1933) (treaties should not be interpreted to render phrases “meaningless or inoperative”).

It is true that article 4 uses the phrase “territory of a belligerent State,” while the other provisions of GC4 employ the term “territory of a party to the conflict” when referring to home territory. Where drafters use different terms in the same treaty, they are ordinarily presumed “to mean something different.” *See Air France v. Saks*, 470 U.S. 392, 397–98 (1985). But in this context, we do not think the variation in language indicates a different meaning. It is easy to construe the phrases “territory of a belligerent State” and “territory of a party to the conflict” as synonyms. Every “party to the conflict” is a “belligerent State,” and every “belligerent State” is a “party to the conflict.” More importantly, if we were to read the phrase “territory of a belligerent State” to include occupied territory, the qualifying phrase would be entirely superfluous, and indeed would be contrary to the treaty’s apparent intention to narrow the exclusion from “protected person” status to a subset of citizens of neutral States.

The negotiating record confirms this meaning of “territory of a belligerent State.” *Cf. Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989) (stating that a treaty’s negotiating record “may of course be consulted to elucidate a text that is ambiguous”). Two aspects of this record make clear that the phrase “territory of a belligerent State” in article 4(2) means “the home territory of a party to the conflict.”

First, the delegates treated the phrases “territory of a belligerent State” and “territory of a Party to the conflict” as synonyms. A proposed draft of article 3A (which later became article 5) began: “Where in the territory of a belligerent, the Power concerned is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State . . . .” 3 *Final Record* at 100. This text was later changed to replace “territory of a belligerent” with “territory of a Party to the conflict.” Although draft article 3A was hotly debated throughout the Convention, none of the delegates reacted in any manner suggesting that the change in language altered the scope of the original article 3A.

Second, and more broadly, the drafting history reveals that the delegates fully understood that nationals of neutral States would have “protected person” status in occupied territory. The Rapporteur who introduced the draft of article 3 (which later became article 4), Col. Du Pasquier (Switzerland), said:

A particularly delicate question was that of the position of the nationals of neutral States. The Drafting Committee had made a distinction between the position of neutrals in the home territory of belligerents and that of neutrals in occupied territory. In the former case, neutrals were protected by normal diplomatic representation; in the latter case, on the other hand, the diplomatic representatives con-

cerned were only accredited to the Government of the occupied States, whereas authority rested with the Occupying Power. It followed that all neutrals in occupied territory must enjoy protection under the Convention, while neutrals in the home territory of a belligerent only required such protection if the State whose nationals they were had no normal diplomatic representation in the territory in question.

2A *Final Record* at 793. Not a single delegate questioned or challenged Du Pasquier’s interpretation of article 4’s text, or his rationale as to why nationals of neutral States should receive “protected person” status in occupied territory.<sup>13</sup>

For these reasons, we conclude that nationals of neutral States are not per se excluded from “protected person” status in occupied Iraq.<sup>14</sup>

## F. Persons Protected by Another Geneva Convention

Article 4(4) provides:

Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members

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<sup>13</sup> A U.S. delegate, Mr. Ginnane, additionally explained that the United States did not want nationals of neutral States to be protected in its home territory: “[I]n the United States of America and in various other countries a large section of the population was composed of aliens who were permanently settled in its territory. In the United States those persons considered themselves as an integral part of the country, and in time of war were treated in practically all respects as American citizens. Their children were brought up as citizens of the United States. Such persons had no need of protection under the Convention.” 2A *Final Record* at 794. The Drafting Committee agreed and crafted article 4 to remove protections from nationals of neutral States only when they find themselves in the home territory of a party to the conflict. *Id.*

<sup>14</sup> Most commentators agree with our interpretation of the phrase “territory of a belligerent State” in article 4(2). See, e.g., Yingling & Ginnane, *supra* note 8, at 411 (1952); ICRC Commentary on GC4, *supra* note 4, at 46; Joyce A.C. Guttheridge, *The Geneva Conventions of 1949*, 26 *Brit. Y.B. Int’l L.* 294, 320 (1949); Morris Greenspan, *The Modern Law of Land Warfare* 157–58 (1959); 2 Howard S. Levie, *The Code of International Armed Conflict* 798 (1986); Vaughn A. Ary, *Concluding Hostilities: Humanitarian Provisions in Cease-Fire Agreements*, 148 *Mil. L. Rev.* 186, 238 (1995); Theodor Meron, *Prisoners of War, Civilians and Diplomats in the Gulf Crisis*, 85 *Am. J. Int’l L.* 104, 106 (1991); Parkerson, *supra* note 8, at 110 (1991). We have discovered three commentators who, to the contrary, have suggested in passing that nationals of neutral countries in occupied territory are not “protected persons.” See Hans-Peter Gasser, *Protection of the Civilian Population, in The Handbook of Humanitarian Law in Armed Conflicts* 241 (Dieter Fleck ed., 1999); Gerhard von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* 91 (1957); Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 *Harv. Int’l L.J.* 503, 512 n.29 (2003). These commentators provide no analysis in support of their assertions concerning the meaning of “territory of a belligerent State,” and we thus find no basis in their statements for questioning the construction outlined above.

of Armed Forces at Sea of August 12, 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall not be considered as protected persons within the meaning of the present Convention.

This provision excludes persons who enjoy protection under one of the other three Geneva Conventions from claiming “protected person” status under GC4. Such persons are excluded because they receive different protections appropriate to their particular status under other Conventions.

### **G. Unlawful Combatants**

GC4’s full title—“Geneva Convention Relative to the Protection of *Civilian* Persons in Time of War,” (emphasis added)—suggests that “[t]he main object of the Convention is to protect a strictly defined category of *civilians*.” ICRC Commentary on GC4, *supra* note 4, at 10 (emphasis added). Consistent with this title, article 4(4) of GC4 expressly excludes lawful combatants who enjoy POW status from “protected person” status. These factors, combined with the fact that unlawful combatants generally receive less favorable treatment than lawful combatants under the Geneva Convention system, *see, e.g., Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949*, 26 Op. O.L.C. 1 (2002) (concluding that GPW withholds protections from persons who engage in hostilities but fail to satisfy criteria for lawful combatancy), might lead one to assume that unlawful combatants are categorically excluded from “protected person” status under GC4.

GC4’s text, however, contemplates that persons who “find themselves” in occupied territory within the meaning of article 4 may engage in at least some forms of unlawful belligerency without forfeiting all of the benefits of “protected person” status. Article 5(2), for example, provides that “an individual protected person” detained in occupied territory “as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power” does not forfeit all GC4 protections. Rather, such persons forfeit only their “rights of communication,” and then only when “absolute military security so requires.” *Id.* art. 5(2). While the scope of conduct contemplated by the phrase “activity hostile to the security of the Occupying Power” is not entirely clear,<sup>15</sup> spies and saboteurs, at least, are unlawful combatants. *See Ex parte Quirin*, 317 U.S. 1, 30–31 (1942). In like manner, article 68 provides that the occupying power “may impose the death penalty on a protected person only in cases where the person is guilty of

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<sup>15</sup> Presumably it should be understood to refer to activities similar to espionage and sabotage. *See, e.g., Norfolk & W. Ry. v. Am. Train Dispatchers’ Ass’n*, 499 U.S. 117, 129 (1991) (“Under the principle of *ejusdem generis*, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration.”).

espionage, of serious acts of sabotage against the military installations of the Occupying Power or of intentional offences which have caused the death of one or more persons.” GC4 art. 68. This provision appears to preserve the procedural and substantive trial protections conferred by articles 69–78 of GC4 for at least some types of unlawful combatants who are otherwise “protected persons” under article 4.

GC4’s negotiating record confirms that at least some forms of unlawful belligerency are not inconsistent with “protected person” status. The original draft of GC4 (the Stockholm text) did not contain any provision akin to article 5. This omission prompted many delegations to express concern that a State engaged in an armed conflict or occupation would be left without “sufficient protection against spies, saboteurs and traitors,” 2A *Final Record* at 796 (summary of statement of Col. Hodgson (Australia)), and that without a provision like article 5, the Convention “would in certain cases jeopardize the very security of the State,” *id.* Such concerns would not have been raised if the original draft had been understood wholly to exclude these sorts of unlawful belligerents from GC4’s protections. The Drafting Committee responded to these concerns by proposing a new draft article 3A (which ultimately became article 5). The Rapporteur, Colonel Du Pasquier (Switzerland), “explained that internal security was one of the main preoccupations of national leaders in time of war,” and that article 3A had been drafted “in order to guard against [the] danger” that “the protection given by the Convention should . . . facilitate the subversive activities of ‘fifth columnists.’” 2A *Final Record* at 796. Though some delegations opposed draft article 3A, *see* 2A *Final Record* at 796–97; 2B *Final Record* at 384, none expressed the view that it was unnecessary because persons who engaged in any form of unlawful belligerency were categorically excluded from “protected person” status under GC4.<sup>16</sup>

We thus conclude that at least some unlawful belligerents can fall within the scope of persons who are “protected” under GC4 so long as they “find themselves” in occupied territory within the meaning of article 4.<sup>17</sup>

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<sup>16</sup> Similarly, in a discussion of then-article 3 (which became article 4), the United Kingdom’s delegate stated that the definition of “protected persons” would “cover individuals participating in hostilities in violation of the laws of war,” and urged that then-article 3 be amended to ensure that “[c]ivilians who violated [the laws of war] should cease to be entitled to the treatment provided for law-abiding citizens.” 2A *Final Record* at 620–21. No delegate disputed the United Kingdom’s interpretation of then-article 3, but ultimately no amendments were made to article 3 in response to the United Kingdom’s concerns.

<sup>17</sup> Numerous commentators conclude that unlawful combatants are not per se excluded from “protected person” status under GC4. *See, e.g.,* Albert J. Esgain & Col. Waldemar A. Solf, *The 1949 Geneva Convention Relative to the Treatment of Prisoners of War: Its Principles, Innovations, and Deficiencies*, 41 N.C. L. Rev. 537, 549 (1962–1963); Baxter, *supra* note 8, at 328; Frits Kalshoven, *Constraints on the Waging of War* 41 (1991); G.I.A.D. Draper, *The Status of Combatants and the Question of Guerilla Warfare*, 45 Brit. Y.B. Int’l L. 173, 193 (1971). Some commentators reach this conclusion by endorsing the view, expressed in the ICRC’s Commentary, that “[e]very person in enemy hands must have some status under international law: he is either a prisoner of war and, as such,

### III. Al Qaeda Operatives in Occupied Iraq

We now turn to the status of al Qaeda operatives captured in occupied Iraq.<sup>18</sup>

#### A. The Interpretive Problem

To say that at least some unlawful combatants may be “protected persons” in occupied territory is not to say that all unlawful combatants captured in Iraq—and in particular al Qaeda terrorist operatives captured there—enjoy this status. GC4 does not expressly address the status of operatives of an international terrorist organization. Whether such terrorists possess “protected person” status therefore depends on whether they fall within the scope of article 4(1), which confines such status to “those who, at a given moment and in any manner whatsoever, *find themselves*, in the case of . . . occupation, in the hands of [an] . . . Occupying Power of which they are not nationals” (emphasis added).

Article 4’s use of the phrase “find themselves” is somewhat unusual and creates an ambiguity in the text. Some have read this phrase broadly, to include within the “protected persons” described in article 4(1) all persons physically present in occupied territory. *See, e.g., Affo v. Commander Israel Defence Force in the West Bank*, 29 I.L.M. 139, 152 (1990) (concluding that “‘protected persons’ . . . em-

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covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. *There is no intermediate status; nobody in enemy hands can be outside the law.*” ICRC Commentary on GC4, *supra* note 4, at 51 (emphasis in original). *See, e.g.,* Paust, *supra* note 14, at 511–12 & n.27; Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. Cal. L. Rev. 1407, 1425 & n.92 (2002). But this is clearly not what the Geneva Conventions provide. Many non-POWs “in enemy hands” will fail to qualify for rights accorded to “protected persons” under GC4, including (a) persons who are nationals of a State that is not bound by the Convention, *see* GC4 art. 4(2); (b) persons who have taken up arms against their country of citizenship, *see* GC4 art. 4(1); (c) persons who have taken up arms against a co-belligerent of their country of citizenship, *see* GC4 art. 4(2); and (d) persons who were not captured in either the “territory of a party to the conflict” or in “occupied territory,” *see* GC4 pt. III, secs. I–III; *supra* Part II.A. The commentators who endorse the ICRC Commentary make no effort to reconcile the Commentary’s aspiration with these undisputable exclusions from GC4’s protections. So while we recognize that at least some types of unlawful combatants can have “protected person” status under GC4, we reject the ICRC Commentary’s mischaracterization of article 4.

<sup>18</sup> In discussing “al Qaeda operatives,” we refer not only to individuals who are formal members of al Qaeda, but also to those who have associated themselves with that organization and are fighting on its behalf. *Cf. Ex parte Quirin*, 317 U.S. 1, 37–38 (1942) (“Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war.”). Our analysis would also apply to members or associates of other terrorist organizations that are sufficiently connected to al Qaeda that they may be deemed participants in its armed conflict against the United States, as well as to members or associates of terrorist organizations that are not so connected to al Qaeda but are separately engaged in global armed conflict against the United States. For purposes of this opinion, we do not attempt to articulate a precise test for identifying such associates or organizations.

braces . . . all persons found in the territory,” including infiltrators who are there illegally); *cf.*, *e.g.*, Yingling & Ginnane, *supra* note 8, at 411 (1952) (implicitly taking this position). Under this interpretation, those who “find themselves” in occupied territory are simply those who “are” in occupied territory, and al Qaeda operatives in occupied Iraq would be “protected persons” under GC4 unless they fall within article 4’s limited nationality exclusions. While “are” may be a possible reading of “find themselves,” it is not the only, or even a particularly obvious, reading of that phrase. Had article 4’s drafters intended this meaning, they could have readily conveyed it with terminology far simpler and clearer than the phrase “find themselves.”

Alternatively, the phrase “find themselves” can be read more narrowly to suggest an element of happenstance or coincidence, and to connote a lack of deliberate action relating to the circumstances that leave the persons in question in the hands of an occupying power. This reading of the phrase is both common and natural. *See, e.g.*, 4 *Oxford English Dictionary* 224 (1933) (defining “find” as “to come upon by chance or in the course of events”); *Funk & Wagnalls New Standard Dictionary of the English Language* 923 (1946) (defining “find” as “to discover or meet with by accident; chance upon; fall in with”). On this narrower reading, al Qaeda operatives in occupied Iraq do not, as a general matter, “find themselves” in that country. Such persons are in Iraq as willing agents of an international terrorist organization engaged in global armed conflict against the occupying powers. Their presence in occupied territory, accordingly, can hardly be attributed to happenstance or coincidence.

This reading of article 4 accords with ordinary usage: one would not say that a terrorist who hijacks an airplane “finds himself” on a hijacked airliner. His presence on the hijacked plane is surely not attributable in any way to happenstance or coincidence; he is there to carry out the hijacking. By contrast, one would say that innocent passengers “find themselves” aboard the hijacked flight. Although their presence on the hijacked plane is in some sense deliberate (presumably they chose to travel on that particular flight), it is accidental or *co*-incidental at least in the sense that it results from factors unrelated to the hijacking. This reading of “find themselves” closely corresponds to the position recognized by one Justice of the Israeli Supreme Court in *Affo*, 29 I.L.M. at 180 (Bach, J., concurring in judgment) (acknowledging that those who “find themselves” in occupied territory could be limited to those who have “fallen into a situation where against their will they find themselves in the hands of one of the parties to the conflict or in the hands of the occupying power; whereas people who subsequently penetrate into that territory with malicious intent are not included in that definition”). It has also been suggested by at least one commentator. *See* Brian Farrell, *Israeli Demolition of Palestinian Houses as a Punitive Measure: Application of International Law to Regulation 119*, 28 *Brook. J. Int’l L.* 871, 922 n.384 (2003) (noting

the possibility that certain persons in occupied territory do not “‘find themselves’ in the hands of the occupying power as contemplated by Article 4”).<sup>19</sup>

Although article 4 can be read to exclude al Qaeda operatives from the class of “protected persons,” we must acknowledge that article 4 could also be read to include such persons. This ambiguity, and GC4’s more general failure to specifically address the status of international terrorist organization operatives in occupied territory, are not surprising. The Geneva Conventions were drafted at a time when conflicts between States were the only transnational armed conflicts that could have been imagined. The 1949 Diplomatic Conference of Geneva occurred in the aftermath of World War II, when States were the sole entities with the organization, discipline, and resources capable of engaging in transnational wars. GC4’s State-centric orientation is clearly reflected in article 2, which limits the applicability of the Geneva Conventions to armed conflicts between States, and occupations of the territory of States, that have either ratified, or else accepted and applied, the Conventions. *See supra* Part I.B.<sup>20</sup>

Because article 4’s application in this context is ambiguous, we turn to other sources for interpretive guidance. *See Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534–35 (1991) (providing that although treaty interpretation “begin[s] with the text of the treaty . . . , [o]ther general rules of construction may be brought to bear on difficult or ambiguous passages”) (internal quotation marks and citations omitted); Vienna Convention on the Law of Treaties art. 32, *opened for signature*

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<sup>19</sup> As we noted, Article 4 extends “protected person” status to all “those who, *at a given moment and in any manner whatsoever*, find themselves . . . in the hands of [an] . . . Occupying Power of which they are not nationals” (emphasis added). The prepositional phrase “at a given moment and in any manner whatsoever” modifies “find themselves” and therefore has no application or relevance to persons who do not “find themselves” in the hands of an Occupying Power. Thus, the meaning of “at a given moment and in any manner whatsoever” does not inform or expand, but instead depends upon and is limited by, “find themselves.” Accordingly, we do not believe this prepositional phrase provides meaningful guidance in choosing between the broad and narrow readings of “find themselves.”

<sup>20</sup> To be sure, common article 3 of GC4 contemplates that a State and non-State actors can engage in an armed conflict “not of an international character” that occurs “in the territory of one of the High Contracting Parties.” *See* Geneva Conventions I–IV, art. 3. But common article 3 confirms that there was no contemplation of non-State terrorist organizations carrying on a global war. It establishes minimal protections of humane treatment for persons involved in conflicts *purely internal to a State*, such as civil wars and related domestic insurgency movements. *See* Bybee Memorandum, *supra* note 5, at 10. The GC4 drafters agreed to common article 3 after a lengthy debate that focused on concerns about the implications of conferring even minimal legal protections on non-State groups in a purely domestic context. *See, e.g.*, 2B *Final Record* at 325 (Soviet delegate Mr. Morosov) (“No other issue has given rise to such a long discussion and to such a detailed and exhaustive study as the question of the extension of the Convention to war victims of conflicts not of an international character.”). The creation of such protections—which fall far short of those conferred on “protected persons” by article 4—“mark[ed] a new step forward,” and represented “an almost unhop[er]-for extension” of international law at the time. *See* ICRC Commentary on GC4, *supra* note 4, at 26. This limited extension, after elaborate discussion, of minimal protections for non-State actors in purely internal armed conflict further confirms that the drafters of GC4 did not contemplate the possibility of full “protected person” status for members of a non-State actor terrorist organization engaged in transnational armed conflict.

May 23, 1969, 1155 U.N.T.S. 331, 340 (“Recourse may be had to supplementary means of interpretation . . . to determine the meaning when [textual] interpretation according to article 31 . . . leaves the meaning ambiguous or obscure . . .”).<sup>21</sup> Resort to extrinsic sources is especially appropriate where, as here, ambiguity results from changed or unforeseen circumstances. In such instances, “it is our responsibility to give the specific words of the treaty a meaning *consistent with the shared expectations of the contracting parties*.” *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 167 (1999) (quoting *Air France v. Saks*, 470 U.S. 392, 399 (1985)) (emphasis added). See also *Rocca v. Thompson*, 223 U.S. 317, 331–32 (1912) (observing that treaties “[l]ike other contracts . . . are to be read in the light of the conditions and circumstances existing at the time they were entered into with a view to effecting the objects and purposes of the States thereby contracting”).

## B. The Benefits-Burdens Principle of the Fourth Geneva Convention

We first consider article 4’s textual ambiguity in light of the objects and purposes of the Geneva Conventions, including GC4. It is well established, both in United States and international practice, that interpretations of ambiguous treaty text should, if possible, accord with such purposes. See *Rocca*, 223 U.S. at 331–32; Vienna Convention art. 31.1, 1155 U.N.T.S. at 340 (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*.”) (emphasis added). One object and purpose of the Geneva Conventions is to exclude from coverage those who engage in transnational armed conflict, even in occupied territory, if their representatives have rejected the burdens of the Geneva Convention system.

This “benefits-burdens” principle finds several expressions in the text of GC4. For example, article 2(1) of GC4 limits the application of the Convention to armed conflicts between High Contracting Parties. Common article 2(1) expresses the principle that entities engaged in armed conflict do not receive Geneva Convention protections unless they also accept the Conventions’ burdens. Article 2(3) similarly reflects a benefits-burdens constraint. It provides that if a “Power[] in conflict” that is not a signatory to GC4 “accepts and applies” GC4, then any signatory State involved in the conflict with that power will be “bound by the Convention” with regard to that “Power.” Article 2(3) further states that if one of the “Powers in conflict” is a non-party to GC4, the “Powers who are parties thereto

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<sup>21</sup> Although the United States is not a signatory to the Vienna Convention, it has recognized that articles 31 and 32 of the Vienna Convention reflect international practice. See Bybee Memorandum, *supra* note 5, at 23. Courts also frequently rely on articles 31 and 32 to interpret treaties. See, e.g., *Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1296 n.40 (11th Cir. 1999); *Kreimerman v. Casa Veerkamp S.A. de C.V.*, 22 F.3d 634, 638 n.9 (5th Cir. 1994).

shall remain bound by it in their mutual relations.” This provision contemplates that even when signatories and non-signatories fight together, signatories owe duties under GC4 only to other signatories, or to those “Powers” that have agreed to accept and apply the Convention. Common article 2(3) makes clear that, though the drafters of the Geneva Conventions did not insist on the formalities of treaty signature and ratification, they did insist that a warring “Party” must accept the burdens of the Conventions, even if somewhat informally, in order to receive their benefits.

The benefits-burdens principle also finds expression in article 4(2), which provides: “Nationals of a State which is not bound by the Convention are not protected by it.” The ICRC’s official Commentary states that article 4(2)’s exception to the definition of “protected person” in article 4(1) is a “truism” and an “unnecessary addition” that follows naturally from article 2(1) even in the absence of article 4(2). ICRC Commentary on GC4, *supra* note 4, at 48. Whether or not this is true, article 4(2) makes this much clear: persons in occupied territory, including those who commit hostile acts there, are not “protected persons” under GC4 if the State that represents them has not formally accepted the Convention’s burdens.

This principle stands out with clarity against the background of GC4’s otherwise very broad reach. Recall that GPW limits POW status, and thus the benefits of GPW, to the lawful combatants of armed forces and related forces of States that are parties to the conflict and have ratified GPW, and thus that have accepted obligations regarding the conduct of armed conflict. By contrast, GC4 casts its net much wider, extending “protected person” status in occupied territory to persons who have no connection to the armed conflict (such as nationals of neutral States) and thus who have no obligations related to the conflict. Even in the context of GC4’s expansive application, however, the drafters were careful to exclude from “protected person” status individuals from States that had not signed the Convention or otherwise accepted and applied its provisions in the relevant conflict.

In sum, articles 2 and 4 reflect the Geneva Conventions’ principle that persons who engage in transnational armed conflicts do not receive the benefits of the Conventions, in occupied territory or otherwise, if their representatives refuse to accept their burdens. GC4 usually expresses this benefits-burdens principle in terms of *nationals of States* that have ratified the Convention. Specifically, GC4 generally provides that nationals of States that fail to assume the burdens of GC4 do not receive its benefits, even in occupied territory. This formulation reflects the drafters’ assumptions that States would be the only entities capable of engaging in a transnational armed conflict, and that denying “protected person” status to nationals of non-compliant States would adequately ensure that all warring entities accepted GC4’s burdens before receiving its benefits.

But the assumption that persons would *only* be identified with States—because States are the only entities that take part in transnational conflicts—does not hold true in the unprecedented context of a global armed conflict in which the armed

forces of a non-State terrorist organization attack a State in territory occupied in connection with an armed conflict between signatory States. Adherence to article 4’s State-centric presuppositions in this context would violate GC4’s fundamental principle that warring entities cannot receive the benefits of GC4 if they reject Geneva Convention duties. Al Qaeda has pointedly declined to accept or apply GC4 or any other principle of the law of armed conflict. If nationals of a rogue State that refused to be bound by the Geneva Conventions engaged in unlawful belligerency on behalf of that rogue State, they would be denied “protected person” status everywhere in the world, including occupied Iraq. *See* GC4 art. 4(2) (“Nationals of a State which is not bound by the Convention are not protected by it.”). It would run sharply contrary to the object and purpose of GC4 to give al Qaeda operatives a more elevated status than such individuals. The conferral of such elevated status would allow a non-State terrorist organization to circumvent GC4’s benefits-burdens principle by using territory occupied in a war between two signatory States as the most advantageous place to carry on their conflict against the occupying power. The sounder approach is to adhere to the benefits-burdens principle embodied in articles 2 and 4—a principle that induces compliance by linking the benefits of the Conventions to acceptance of their obligations.<sup>22</sup> *See* Bybee Memorandum, *supra* note 5, at 10.

Our recourse to fundamental principles to address an ambiguity in article 4 is not unusual. In the context of the law of armed conflict, interpreters faced with changed or unexpected circumstances have not hesitated to resort to a treaty’s fundamental principles to avoid a non-contextual reading of a treaty term that, wrenched from its original context, might lead to a conclusion that does violence to the treaty’s object and purpose. And they have done so even when construing treaty text far less ambiguous than article 4.

For example, when the Allied Powers occupied Germany and Japan at the end of the Second World War, they did not apply rules of belligerent occupation set forth in the Hague Regulations—and in particular the duty to “respect[, unless absolutely prevented, the laws in force in the country,” *see* Hague Regulations art. 43—that were premised on fundamental assumptions that did not apply in those contexts.<sup>23</sup> Similarly, following the end of active hostilities in the Korean War, the

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<sup>22</sup> This principle would apply even if the entity that does not accept the burdens of the Convention is or becomes actively intertwined in the armed conflict between the signatory States. *See* GC4 art. 2(3) (providing that when a “Power[] in conflict” is *not* a Party, the Powers who are parties remain bound by it only in “their mutual relations”); *id.* art. 4(2) (providing that “Nationals of a State which is not bound by the Convention are not protected by it”).

<sup>23</sup> *See, e.g.,* R.Y. Jennings, *Government in Commission*, 23 *Brit. Y.B. Int’l L.* 112, 135–36 (1946) (noting that the assumptions of the Hague Regulations—concerning the need to protect the sovereignty of the legitimate government of the occupied territory and the inhabitants of the occupied territory from being exploited for the prosecution of the occupant’s war—were not served by application of the Regulations to occupied Germany, and concluding that “the whole *raison d’être* of the law of belligerent occupation is absent in the circumstances of the Allied occupation of Germany, and to attempt to apply it would be a manifest anachronism”); W. Friedmann, *The Allied Military Government*

United Nations Powers declined to repatriate POWs who feared to return to their countries, even though article 118 of GPW states that POWs “shall be released and repatriated without delay after the cessation of active hostilities,” and even though article 7 of GPW makes the right of repatriation non-waivable. The United States and others supported this conclusion based on the fundamental purposes underlying the Convention.<sup>24</sup> In 1968, the Privy Council declined to extend POW status under GPW to nationals of the State that captured them even though article 4 of GPW contains no such express exception.<sup>25</sup> This conclusion, which is generally approved by commentators,<sup>26</sup> was premised on the view that the fundamental purpose of the Convention was “for the protection of the members of the national forces of each against the other.”<sup>27</sup>

Finally, the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) has twice read GC4 article 4’s definition of “protected persons” to include within the class of “protected persons” nationals of the party to the conflict in whose hands they are found.<sup>28</sup> The ICTY tribunals reached this conclusion, despite article 4’s limitation of “protected person” status to those who find themselves in the hands of a power “of which they are not nationals,” GC4 art. 4(1), on the basis of GC4’s fundamental purposes—a source of interpretive guidance, the ICTY tribunals explained, that was appropriate to look to because the framers of GC4 never could have contemplated the scope or significance of “present-day inter-ethnic conflicts.”<sup>29</sup> In these cases, the

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*of Germany* 67 (1947) (“It is not . . . surprising that International Law . . . should not be fully equipped to deal with an entirely unprecedented situation” following post-World War II occupations.); Roberts, *supra* note 4, at 269–70 (1984) (citing Jennings and Friedman approvingly); Glahn, *supra* note 14, at 281 (Hague Regulations “lost their applicability to the Allied occupation of Germany”).

<sup>24</sup> See, e.g., Dep’t of State, *Memorandum Re: Legal Considerations Underlying the Position of the United Nations Command Regarding the Issue of Forced Repatriation of Prisoners of War* (Oct. 24, 1952); Howard S. Levie, *Prisoners of War in International Armed Conflict*, 59 Int’l L. Studies 424 (Naval War College 1978).

<sup>25</sup> *Public Prosecutor v. Oie Hee Koi*, [1968] 2 W.L.R. 715, 727 (P.C.) (concluding that GPW “does not extend the protection given to prisoners of war to nationals of the detaining power”).

<sup>26</sup> See Ian Brownlie, *Law of War—Geneva Convention Relative to the Treatment of Prisoners of War, Articles 4 and 5—Burden of Proof on Issue of Protected Status—Status of Nationals of a Person Owing ‘Allegiance’ to the Detaining Power*, 43 Brit. Y.B. Int’l L. 234, 235–37 (1968–1969); R.R. Baxter, Notes and Comments, *The Privy Council on the Qualifications of Belligerents*, 63 Am. J. Int’l L. 290, 291 (1969); Draper, *supra* note 17, at 193–94 n.3.

<sup>27</sup> *Public Prosecutor v. Oie Hee Koi*, [1968] 2 W.L.R. 715, 726 (P.C.).

<sup>28</sup> *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Appeals Chamber Judgement ¶¶ 151–52 (Mar. 24, 2000); *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Chamber Judgement ¶¶ 163–70 (July 15, 1999). Cf. *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 169 (2d Cir. 2003) (noting that although the actions of the ICTY multinational tribunal may have some persuasive value, it is not “empowered to create binding norms or customary international law”); Statute of the International Criminal Court for Former Yugoslavia (as amended through May 19, 2003) (limiting ICTY’s charter to prosecutions under current law).

<sup>29</sup> *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Appeals Chamber Judgement ¶¶ 151–52 (Mar. 24, 2000); see also *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Chamber Judgement ¶¶ 163–70 (July 15, 1999).

ICTY tribunals read behind article 4’s assumption that persons should be identified with the State of their nationality for purposes of article 4 “protected person” status when the context in which GC4 was being applied did not bear out article 4’s State-centric assumptions. In *Tadic*, for example, an ICTY Appeals Chamber noted that GC4 was drafted when “wars were primarily between well-established States,” and concluded, based on GC4’s “object and purpose,” that its State-centric terms should not be applied woodenly in unanticipated “modern inter-ethnic armed conflicts such as that in the former Yugoslavia.”<sup>30</sup> Even more relevant for present purposes, the ICTY Court noted that in such changed circumstances, “ethnicity may become determinative of national allegiance,” and that “[u]nder these conditions, the requirement of nationality is even less adequate to define protected persons.”<sup>31</sup> In short, *Tadic* looked behind GC4 art. 4’s nationality criterion to find a criterion that better served GC4’s object and purpose when applied to unforeseen circumstances.

In determining whether al Qaeda operatives warrant “protected person” status in occupied Iraq, it is at least as appropriate as in the cases described above, if not more so, to look to the fundamental principles underlying GC4 to determine how a genuine textual ambiguity in article 4 should be resolved in a context wholly outside the contemplation of GC4’s drafters. Our recourse to these fundamental principles supports the conclusion that, with the caveat addressed in Part III.D below, al Qaeda operatives captured in occupied Iraq lack “protected person” status under GC4.

### **C. The Focus of the Fourth Geneva Convention on Protecting Citizens and Permanent Residents**

We next consider the ambiguity in article 4 in light of the legal landscape against which GC4 was negotiated, as well as the negotiation record itself. See *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 665–69 (1979) (emphasizing the historical background against which the treaty at issue was signed); *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989) (stating that a treaty’s negotiating record “may of course be consulted to elucidate a text that is ambiguous”); Vienna Convention art. 32, 1155 U.N.T.S. at 340 (providing that the “preparatory work of the treaty” may be consulted to resolve ambiguities in a treaty’s text). These sources suggest that the protections that GC4 provides for some unlawful combatants in occupied territory were

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<sup>30</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Chamber Judgement ¶ 166 (July 15, 1999).

<sup>31</sup> *Id.*; see also Theodor Meron, Editorial Comment, *Classification of Armed Conflict in the Former Yugoslavia: Nicaragua’s Fallout*, 92 Am. J. Int’l. L. 236, 239 (1998) (“Enforcing [article 4’s nationality-based criteria for ‘protected person’ status] literally in . . . conflicts involving the disintegration of a state or political entity and the resulting struggle between peoples and ethnic groups, would be the height of legalism. . . . In many contemporary conflicts, the disintegration of states and the establishment of new ones make nationality too messy a concept on which to base the application of international humanitarian law.”).

intended primarily to protect citizens and permanent residents who participate in popular resistance movements—persons who as a general matter are not similarly situated to members of an international terrorist organization engaged in global armed conflict against the occupying powers.

Pre-GC4 international law focused on the occupying power's duty to protect the occupied territory's citizens and inhabitants, as distinct from other groups. The preamble to the 1907 Hague Regulations (which GC4 expressly preserves, *see* GC4 art. 154) declared that "the inhabitants" remained under the protection of the "principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience." Hague Regulations pmbl. Subsequent international law retained this general focus. For example, the London Charter for the Nuremberg Trials considered "deportation" to be a war crime, and legal actions under that instrument—including judgments of the International Military Tribunal at Nuremberg—were used to punish actions directed at the occupied country's citizens and inhabitants.<sup>32</sup>

GC4 derives from this tradition. Article 65 of GC4 specifies that penal provisions enacted by the Occupying Power "shall not come into force before they have been published and brought to the knowledge of the *inhabitants* in their own language." In like manner, GC4 requires the Occupying Power to ensure the food and medical supplies "of the population" (art. 55), to ensure relief schemes if "the whole or part of the population of an occupied territory is inadequately supplied" (art. 59), and to "facilitate the proper working of all institutions devoted to the care and education of children" (art. 50). Each of these provisions suggests obligations focused on persons who constitute the permanent residents of the area.

A similar focus underlies article 5's express protection for "spies," "saboteurs," and "person[s] under definite suspicion of activity hostile to the security of the Occupying Power." In the *travaux préparatoires*, the GC4 drafters assumed that the protections they conferred on certain unlawful combatants were for local citizens or permanent residents who engaged in activities hostile to the occupying power. For example, in describing article 5, the Committee III Report said: "In occupied territory, the fact that *a national of the Occupied Power* harbours resentment against the Occupying Power is likewise insufficient [to deny rights of communication under Article 5]." 2A *Final Record* at 815. Similarly, the Soviet

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<sup>32</sup> The focus on protecting citizens and inhabitants was evident, for example, in the definitions of the crime of "deporting civilians" that emerged from *United States v. Milch*, 2 Trials of War Criminals Before the Nuremberg Military Tribunals 353 (1946–1949) (trial of Field Marshal Erhard Milch). The indictment in *Milch* defined the crime of deportation to involve "citizens," the prosecutor described the crime to involve "people who had been uprooted from their homes in occupied territories," the three-judge tribunal convicted the defendant for the crime as charged, Judge Musmanno's concurring opinion described the crime as extending to the occupied territory's "inhabitants," and the concurring opinion of Judge Phillips described it as extending to the "population" of occupied territory. *Id.* at 691–93, 790, 879, 866.

delegate assumed that protected unlawful combatants in occupied territory were “citizens” of the occupied country. See 2B *Final Record* at 379 (“I would like to ask the originators of article 3A, and those who light-heartedly support it, whether there is in the whole world a country whose *citizens* would be loyal to the Occupying Power.”).<sup>33</sup>

The protections for POWs in occupied territory conferred by GPW confirm the Geneva Conventions’ focus on the citizens and permanent residents of occupied territory, as opposed to international terrorists. GPW extended POW status for the first time to “[m]embers of . . . militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied,” provided that they satisfy the traditional criteria for lawful combatancy. GPW art. 4(A)(2) (emphasis added). The drafters of GPW included this provision to confer future protections on some (though not all) of the actions of resistance movements like those that fought the Nazis in occupied territory in World War II.<sup>34</sup> In article 4(A)(2)’s negotiating history, the delegates understood and assumed that the militia and volunteer corps entitled to protections in occupied territory were indigenous resistance movements comprised of citizens, or at the very least permanent residents, of the occupied countries.<sup>35</sup> And in the debate over the GPW Convention, numerous participants expressed sympathy for combatants fighting the occupying power for reasons of “patriotism”—a term that can only be assumed

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<sup>33</sup> Cf. 2B *Final Record* at 379 (Mr. Morosov (Soviet Union)) (“Nor has this stipulation any bearing whatsoever on members of the civilian population of occupied territories suspected of activity hostile to the State”) (emphasis added); *id.* (“What has been said about alien nationals of an enemy Power who may be in the territory of a belligerent is even more applicable to the civilian population of occupied territories.”) (emphasis added).

<sup>34</sup> See 2A *Final Record* at 562 (Committee Report) (describing the protections accorded by article 4(A)2 as “an important innovation . . . which has become necessary as a result of the experience of the Second World War”); *The Geneva Conventions of 12 August 1949, Commentary, III Geneva Convention Relative to the Treatment of Prisoners of War* 58 (Jean S. Pictet ed., 1960) (“[T]he term ‘resistance’ . . . constitutes a clear reference to the events of the Second World War and to the resistance movements which were active during that conflict.”); Levie, *supra* note 24, at 39 (“During World War II so-called resistance movements sprang up or were created within the territory of most of the countries occupied by an enemy, whether the occupation was partial or total. It was with respect to the status of members of these types of resistance movements that the 1949 Diplomatic Conference was attempting to make provision.”) (emphasis added).

<sup>35</sup> See, e.g., 2A *Final Record* at 240 (Mr. Cohn (Denmark)) (“Civilians who took up arms in good faith for the defence of their country against an invader should . . . have the benefit of the protection accorded to prisoners of war”) (emphasis added); *id.* at 241 (Mr. Larmale (France)) (“recall[ing] the discussions on the subject of the importance of resistance movements which had taken place at the Conference of Government Experts”) (emphasis added); *id.* at 242 (Mr. Pesmazoglou (Greece)) (urging that the term “member of a resistance movement” be included in article 4(A) and not the term “partisan” since “it was a question of national, and not political, movements”) (emphasis added); *id.* at 426 (General Slavin (Soviet Union)) (“Civilians who took up arms in defence of the liberty of their country should be entitled to the same protection as members of armed forces”) (emphasis added).

to refer to citizens.<sup>36</sup> In short, both GPW and GC4 contemplate protections in occupied territory primarily for local citizens or permanent residents. When such persons fight on behalf of movements that respect the laws and customs of war, they receive POW status, *see* GPW arts. 4(A)(2); 4(A)(6); those who do not respect the laws and customs of war receive “protected person” status under GC4.

In sum, GC4’s drafting history, read in context, shows that GC4 was designed to confer “protected person” status primarily on citizens or permanent residents of occupied territory, whether unlawful combatants or not, but not on operatives of an international terrorist organization who are in occupied territory as part of a global armed conflict. It is natural to view citizens and permanent residents of occupied territory as persons who “find themselves” in the hands of the Occupying Power, and the resistance activities of citizens and permanent residents are most clearly within the contemplation of the Geneva Conventions.<sup>37</sup> By contrast, with a caveat noted directly below, members of an international terrorist organization in occupied territory to attack the occupying power are clearly outside the core concern of GC4 and are difficult to characterize as persons who “find themselves” in occupied territory, especially since the conferral on them of “protected person” status would create tension with the Geneva Conventions’ fundamental principle that warring entities must accept the Conventions’ burdens in order to claim their benefits.

#### **D. Iraqi al Qaeda Captured in Occupied Iraq**

The analysis thus far suggests that the ambiguity in article 4 should be resolved by excluding al Qaeda terrorist operatives found in occupied Iraq from “protected person” status. However, there is a sub-category of al Qaeda operatives—those who are Iraqi nationals or permanent residents—for which the analysis differs. Unlike non-Iraqi terrorist operatives, citizens and permanent residents of Iraq could be said to “find themselves” there even under the narrow reading of article 4. Such persons’ presence in occupied Iraq could be attributed as much to their status

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<sup>36</sup> *See, e.g.,* 2A *Final Record* at 242 (General Sklyarov (Soviet Union)) (describing the militia and volunteer corps as “organizations which had out of *patriotism* taken up arms to defend the honour and the independence of *their* country”) (emphasis added); *id.* at 422 (Mr. Gardner (England)) (characterizing guerilla forces as those that “began by being groups of *patriots* and gradually established discipline”) (emphasis added).

<sup>37</sup> We note that *stateless noncombatants* might also be among the residents that the GC4 framers meant to include within “protected persons,” at least when they “find themselves” in occupied territory at the time of occupation or as a result of having fled there after occupation as refugees of war. *See, e.g.,* 2A *Final Record* at 621 (Mr. Castberg (Norway)) (“ex-German Jews denationalized by the German Government, who found themselves in territories subsequently occupied by the German Army . . . should be able to claim protection under the Convention”); *see also* ICRC Commentary on GC4, *supra* note 4, at 47 (stating that article 4 was drafted to ensure that protections would not be withheld from refugees who “had fled from their homeland and no longer considered themselves, or were no longer considered, to be nationals of that country”).

as citizens or permanent residents who owe that country allegiance as to their status as agents of an international terrorist organization engaged in global armed conflict with the occupying powers. Furthermore, as explained above, the negotiating record makes clear that GC4 was primarily designed to protect citizens and permanent residents of occupied territory, including those who commit hostile acts against the occupying power. “Protected person” status under GC4 exists primarily for the benefit of these persons even when they act as unlawful combatants. It is true that reading article 4 to protect anyone in Iraq who fights on behalf of an enemy force that does not assume the burdens of GC4 is in tension with GC4’s benefits-burden principle, described above. But in the context of citizens or permanent residents of Iraq, we conclude that the text of article 4 (which is less ambiguous in this narrow context) and the negotiating record provide more compelling interpretive guidance than the guidance we derive from the benefit-burdens principle.

#### **IV. Conclusion**

We conclude that the following persons, if captured in occupied Iraq, are not “protected persons” within the meaning of GC4 article 4: U.S. nationals, nationals of a State not bound by the Convention, nationals of a co-belligerent State, and operatives of the al Qaeda terrorist organization who are not Iraqi nationals or permanent residents of Iraq.

JACK L. GOLDSMITH III  
*Assistant Attorney General*  
*Office of Legal Counsel*

## Mechanisms for Funding Intelligence Centers

Agencies may use the Economy Act to pay for facilities and services provided by the Terrorist Threat Integration Center and the Terrorist Screening Center.

It is within the reasonable discretion of fiscal officers to compute the “actual cost” to be charged for those facilities and services.

March 19, 2004

### MEMORANDUM OPINION FOR THE LEGAL ADVISER DEPARTMENT OF STATE

You have asked for our opinion about the legality of certain mechanisms for funding two intelligence centers—the Terrorist Threat Integration Center (“TTIC”) and the Terrorist Screening Center (“TSC”). Letter for Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, from William H. Taft, IV, Legal Adviser, Department of State (Dec. 12, 2003) (“State Letter”). We believe that it would be lawful for the agencies taking part in these centers to make payments reflecting the services and other benefits that the centers provide to them. We further believe that the precise formulas for computing the payments from each agency are, as a legal matter, left to the reasonable discretion of fiscal officers.

#### I.

Both TTIC and TSC are designed to bring together employees from various agencies of the government and to combine and organize the intelligence gathered by those agencies, so that it can best be used against the threats posed by terrorists. TTIC is “an interagency joint venture that . . . integrate[s] and analyze[s] terrorist threat-related information, collected domestically or abroad, and disseminate[s] such information to appropriate recipients.” Director of Central Intelligence Directive 2/4, *Terrorist Threat Integration Center* at 1 (May 14, 2003) (“DCID 2/4”). It was created through the Director of Central Intelligence’s DCID 2/4, at “the direction of the President, as articulated in his State of the Union Address on 28 January 2003” and elsewhere. *Id.* TTIC is housed at the Central Intelligence Agency (“CIA”) and is overseen by the Director of Central Intelligence, as head of the intelligence community. *Id.* at 2; State Letter at 1. The members of TTIC include the CIA, Department of State, Department of Justice/Federal Bureau of Investigation (“FBI”), Department of Homeland Security, and various intelligence entities of the Department of Defense. DCID 2/4, at 2.

The President provided for TSC in Homeland Security Presidential Directive 6, *Integration and Use of Screening Information* (Sept. 16, 2003) (“HSPD-6”). HSPD-6 ordered the Attorney General to create TSC “to consolidate the Government’s approach to terrorism screening and provide for the appropriate and lawful

use of Terrorist Information in screening processes.” *Id.* TSC is to maintain a database related to terrorism and to respond to inquiries from federal, state and local, and foreign governments and possibly from private entities. State Letter at 2. The agencies involved in operating this joint venture, which is housed at the FBI, include the Department of State, Department of Justice/FBI, and Department of Homeland Security. *Id.*

As we understand the arrangements for funding in the current fiscal year, “all agencies that are assigning staff and relocating relevant operations to the two projects [would] pay a share of the costs based on the proportion of staff being assigned.” State Letter at 2. The funds for TTIC would go to the Director of Central Intelligence’s Community Management Staff; for TSC, the funds would go to the FBI. *Id.* You have asked whether these funding arrangements are lawful. In particular, you have asked whether the Economy Act, 31 U.S.C. § 1535 (2000), which allows agencies to purchase goods and services from other agencies, would authorize the arrangements or whether they would conflict with an appropriations rider forbidding the use of any appropriation for “interagency financing of boards (except Federal Executive Boards), commissions, councils, committees, or similar groups (whether or not they are interagency entities),” unless the interagency entities have “prior and specific statutory approval to receive financial support from more than one agency or instrumentality.” Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 610, 118 Stat. 3, 351. You have also asked whether, assuming the Economy Act may be used, the formulas for allocating the costs here would be lawful. State Letter at 2.

The Justice Management Division submitted a memorandum arguing that the funding arrangements, including the allocation formulas, comply with the law. Memorandum for M. Edward Whelan III, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Stuart Frisch, General Counsel, Justice Management Division, *Re: Interagency Funding of the Terrorist Threat Integration Center and the Terrorist Screening Center* (Jan. 23, 2004) (“JMD Memorandum”). The Office of Management and Budget endorsed the JMD Memorandum. Letter for M. Edward Whelan III, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Jennifer G. Newstead, General Counsel, Office of Management and Budget (Feb. 20, 2004).

## II.

At both TTIC and TSC, the host agency provides goods and services to the other participating agencies so that those agencies can carry out their own functions more effectively. Each center provides a location where employees of the agencies can exchange and organize information. The centers offer physical infrastructure, such as office space and computers. They also offer such services as access to databases that pool information supplied by the various agencies and other sources. JMD Memorandum at 3–4. Under the contemplated arrangements,

participating agencies would pay for these goods and services under the Economy Act.

The Economy Act provides that the head of one agency “may place an order with . . . another agency for goods or services” if

- (1) amounts are available;
- (2) the head of the ordering agency . . . decides the order is in the best interest of the United States Government;
- (3) the agency . . . to fill the order is able to provide or get by contract the ordered goods or services; and
- (4) the head of the agency decides ordered goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise.

31 U.S.C. § 1535(a). The amount to be paid must be the “actual cost of goods or services provided.” *Id.* § 1535(b). Payment may be made in advance, with “proper adjustment” later to meet the “actual cost” requirement. *Id.*

As long as the participating agencies pay the “actual cost of goods or services provided,” a subject we discuss below, these requirements of the Economy Act would be met. Because participating agencies use TTIC and TSC to carry out their own functions, the agencies’ appropriations may be spent on the goods and services that the centers provide, *see* 31 U.S.C. § 1301(a) (2000) (appropriations may “be applied only to the objects for which the appropriations were made”), and their funds are thus “available” under 31 U.S.C. § 1535(a)(1), as long as the amounts of those funds remain sufficient. The President has determined that the operations of TTIC and TSC are important for protecting the nation against terrorists, and the head of a participating agency thus could “decide[] the order [for goods and services] is in the best interest of the United States Government,” as required by 31 U.S.C. § 1535(a)(2). The CIA and FBI are able to provide these goods and services. *Id.* § 1535(a)(3). And the heads of participating agencies could reasonably determine, under 31 U.S.C. § 1535(a)(4), that no commercial enterprise could offer the same services as “conveniently” or perhaps even at all.

As shown by the Comptroller General’s opinion in *To the Secretary of Commerce*, 38 Comp. Gen. 36 (1958),<sup>1</sup> the Executive Branch has before put in place somewhat similar arrangements under the Economy Act. There, the Comptroller General concluded that the Weather Bureau could not allow a private company to

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<sup>1</sup> “The opinions and legal interpretations of the General Accounting Office and the Comptroller General often provide helpful guidance on appropriations matters and related issues” but “are not binding upon departments, agencies, or officers of the Executive Branch.” *Applicability of Government Corporation Control Act to “Gain Sharing Benefit” Agreement*, 24 Op. O.L.C. 212, 216 n.3 (2000) (citing *Bowsher v. Synar*, 478 U.S. 714, 727–32 (1986)).

connect with a natural gas line that the Weather Bureau maintained. In explaining one ground for this decision, the Comptroller General wrote “that the funds used for construction of the natural gas line and distribution system were advanced to the Weather Bureau by the several agencies to be benefited from the facilities under section 601 of the Economy Act of 1932.” 38 Comp. Gen. at 38 (citations omitted). Therefore, he reasoned, “such facilities must be regarded as property under the control of those agencies on a pro rata basis even though presently in the custody of the Weather Bureau under the involved arrangement,” and the Weather Bureau therefore could not “limit, restrict, reduce, abridge, or encumber in any manner the pro rata interests of the other agencies in the facilities.” *Id.* (citations omitted). Although the Comptroller General did not directly address the legality of the agency payments under the Economy Act, he appears to have assumed the legality of those arrangements by concluding that the various agencies had acquired interests that the Weather Bureau could not lawfully abridge. Similarly, the agencies taking part in TTIC and TSC would be paying for joint facilities they have the right to use, as well as for services of mutual benefit. The JMD Memorandum argues that they may even acquire the same sort of property interests as recognized in the Comptroller General’s decision. *Id.* at 11. In any event, the Economy Act would permit the arrangements.

The Economy Act requires that an ordering agency pay only the “actual cost” of the ordered goods or services. 31 U.S.C. § 1535(b). Payment under the Economy Act must ensure that “the performing agency is reimbursed for its costs,” *Letter for David P. Holmes, Acting General Counsel, Central Intelligence Agency*, B-250,377, 1993 WL 35613, at \*2 (Comp. Gen. Jan. 28), but “any retention of amounts in excess of actual costs . . . would result in an improper augmentation of the [performing agency’s] appropriations,” *In re Bureau of Land Management—Disposition of Water Resources Council Appropriations Advanced Pursuant to the Economy Act*, 72 Comp. Gen. 120, 122 (1993) (citation omitted). The assignment of costs requires an element of judgment. “While the Economy Act requires recovery of ‘actual costs,’ . . . the term has a flexible meaning and recognizes distinctions or differences in the nature of the performing agency, and the purposes or goals intended to be accomplished.” *In re Washington National Airport; Federal Aviation Administration; Intra-Agency Reimbursements Under 31 U.S.C. 686 (1970)*, 57 Comp. Gen. 674, 685 (1978). The question of cost computation is “one primarily for administrative consideration, to be determined by agreement between the agencies concerned.” *Reimbursement for Interagency Services*, 22 Comp. Gen. 74, 78 (1942).

You have raised questions about two particular aspects of the cost allocation formulas for TTIC and TSC: first, the allocation of costs according to the number of employees that each agency situates at TTIC or TSC; and, second, the inclusion in the assigned costs during a single year of capital expenditures for facilities to be used over a number of years. State Letter at 3–6. The JMD Memorandum suggests a rationale for each of these elements in the cost formula. As to the assignment of

costs per capita, the JMD Memorandum argues that “[w]ith respect to operations such as TTIC and TSC, where unit pricing of outputs is not realistic, per capita and similar approaches are widely used and embraced by accountants and auditors alike.” *Id.* at 9. The JMD Memorandum also contends that the number of employees assigned to each center is a reasonably accurate basis for estimating the costs of providing facilities and equipment for these employees and for estimating the “interest” (and, we take it, the demands) of the agency with respect to overhead resources. *Id.* at 10. As to capital expenditures, the JMD Memorandum argues that the “actual costs” are whatever the host agency pays in a particular year and that the State Department would obtain an ownership interest in the capital resources commensurate with its cost allocation. *Id.* at 11. We do not need to resolve these issues. At least as long as a cost assignment method is reasonable, we believe that the fiscal experts are free to use or reject it: “As long as the amount agreed upon [by the agencies] results from a bona fide attempt to determine the actual cost and, in fact, reasonably approximates the actual cost,” there should be “no objection to payment in the amount agreed upon.” *To Mr. Neal J. Price, Authorized Certifying Officer, International Cooperation Administration*, B-133,913, 1958 WL 2065, at \*1 (Comp. Gen. Jan. 21). We believe that the methods to be used here would rest on “a bona fide attempt to determine the actual cost” and would be reasonable.

### III.

We also believe that the proposed arrangements would not violate the bar against “interagency financing” in section 610 of the Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 3, 351:

No part of any appropriation contained in this or any other Act shall be available for interagency financing of boards (except Federal Executive Boards), commissions, councils, committees, or similar groups (whether or not they are interagency entities) which do not have a prior and specific statutory approval to receive financial support from more than one agency or instrumentality.

We believe that this appropriations rider would not bar transactions under the Economy Act in connection with an intelligence center, staffed by employees of several agencies, that supplies goods and services that the constituent agencies use. To the extent that agencies would pay an intelligence center for goods and services, they would not “financ[e]” the center. In the ordinary meaning of the word, consumers do not “finance” a seller when they buy its products or services. *See Webster’s Third New International Dictionary* 851 (1993) (examples of use of term meaning “to raise or provide funds or capital for” include no instances of a consumer’s providing funds through a purchase). Moreover, even if orders under the Economy Act could be said to provide “interagency financing,” the Economy Act is a “prior and specific statutory approval to receive financial support from

more than one agency or instrumentality” within the meaning of this provision. While the Economy Act does not “specific[ally]” address interagency groups as a class, let alone any particular group, it does set up a mechanism by which a single agency may supply goods and services to several other agencies.

We note that this interpretation accords with decisions of the Comptroller General. Shortly after Congress first enacted riders on interagency financing in 1969, the Comptroller General considered application of such a rider to the Interagency Institutes for Federal Hospital Administrators. *To the Administrator, Veterans Administration*, 49 Comp. Gen. 305 (1969). The Veterans Administration had contracted for the services of a director of this interagency venture, and the agency members then shared the costs of the contract. The Comptroller General found that the arrangement violated the rider, but he did not rule that the Economy Act would be unavailable for the purchase of goods or services from an interagency entity. Instead, he pointed to a peculiarity of the Economy Act at the time. Under the version then in effect, the Economy Act specifically named those agencies that could obtain goods or services from a supplying agency that contracted for goods or services from an outside seller, rather than providing them directly. One of the agencies involved in the particular case was not named in the statute and thus lacked the necessary authority to obtain goods and services that the supplying agency had obtained by contract:

Concerning the use of the authority contained in section 601 of the Economy Act as a basis for the proposed arrangement, we note that that section permits only certain enumerated agencies to place orders with other agencies for services which the latter agencies may be in a position to procure by contract. Since the Department of Health, Education, and Welfare is not one of the enumerated agencies, [the Veterans Administration] may not obtain any services by that contract for that department under the authority of [the Economy Act].

49 Comp. Gen. at 307 (citation omitted). Accordingly, the Economy Act was unavailable because its terms had not been met, not because the rider precluded its use.

In a later opinion, the Comptroller General wrote that “[g]enerally, the restriction [against interagency financing] prohibits agencies from making voluntary contributions or payments in support of interagency ventures.” *In the Matter of U.S. Equal Employment Opportunity Commission—Reimbursement of Registration Fees for Federal Executive Board Training Seminar*, 71 Comp. Gen. 120, 121 (1991) (citation omitted). Accordingly, he concluded that the restriction

does not . . . prohibit an agency from paying a registration fee to permit an employee to attend a Federal Executive Board sponsored EEO training seminar if, as is the case here, the fee appears to reasonably and accurately reflect the cost incurred by the Board for the

employee to attend the seminar. So long as the payment of such a fee directly benefits the agency making the payment and the fee does not include an element designed to capture more than the costs of sponsoring the seminar, we would not view the expenditures at hand as interagency financing.

*Id.* at 121–22 (citation omitted). This analysis largely tracks ours here. While the appropriations rider bars agencies, in the Comptroller General’s phrase, from making “voluntary contributions or payments in support of interagency ventures,” it does not forbid otherwise lawful transactions in which agencies pay for the costs of goods or services that they receive from interagency groups. *See also In the Matter of Career Service Awards Program*, 70 Comp. Gen. 16, 17 n.3 (1990).<sup>2</sup>

This interpretation is not undermined by the treatment of other appropriations riders in the Consolidated Appropriations Act that refer to the ban against interagency financing. These riders state that “notwithstanding . . . section 610,” funds “shall be available for interagency funding” of specific ventures, or they use similar formulations.<sup>3</sup> If the funding arrangements under these provisions necessarily involved cost-based transactions under the Economy Act in which several agencies paid, it might be argued that the separate exceptions were necessary to overcome the bar on “interagency financing” under section 610 and that the Economy Act therefore did not constitute “a prior and specific statutory approval to receive financial support from more than one agency or instrumentality” within the meaning of section 610. However, the Office of Management and Budget informs us that, so far as it is aware, the allocation of costs to agencies under these provisions is not based on actual cost of goods or services supplied. For example, the funding for interagency councils under section 627 comes from contributions

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<sup>2</sup> In another opinion, the Comptroller General disputed the use of a cost allocation method that “does not necessarily relate” to the goods and services actually provided and “do[es] not identify what goods or services each participant actually receives.” *In re Invoice to IRS for That Agency’s Share of CFC Solicitation Expenses Incurred in Northern Utah in 1985*, 67 Comp. Gen. 254, 258 (1988). The State Letter observes that the opinion first found the rider to forbid the arrangement in question and then concluded that “[e]ven if one could successfully argue that this restriction did not apply to the voucher in question, payment on this voucher would still have to satisfy” the restrictions of the Economy Act and the other statutory restrictions on the transfer of funds. *CFC Solicitation Expenses*, 67 Comp. Gen. at 257. As the State Department reads the opinion, “the Comptroller General . . . discusses the Economy Act, but only as imposing additional requirements that would have to be satisfied, if the prohibition on inter-agency funding did not apply.” State Letter at 2. We believe that the Comptroller General’s later opinion on fees for equal employment opportunity training, discussed in text, more accurately states the governing legal principles.

<sup>3</sup> Section 615 covers certain “national security and emergency preparedness telecommunications initiatives”; section 626 deals with the Joint Financial Management Improvement Program; section 627 concerns the Policy and Citizen Services account at the General Services Administration; section 630 applies to “specific projects, workshops, studies, and similar efforts to carry out the purposes of the National Science and Technology Council”; and section 648 deals with the transfer of money for the operation of Midway Atoll Airfield. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 3, 353, 356, 357, 362.

under a formula according to which twenty percent of the funding is drawn from identical contributions from all twenty-four agencies involved, forty percent of the funding is based on each agency's information technology spending as a percentage of the total for the twenty-four agencies, and another forty percent is based on each agency's discretionary budgetary authority as a percentage of the total for the twenty-four agencies. The "notwithstanding" provisions in the statute thus permit funding arrangements that otherwise would constitute "interagency financing" as we have interpreted that term here—the payment of contributions that do not reflect actual costs. In any event, even if the funding arrangements under some or all of these provisions did necessarily involve cost-based transactions under the Economy Act in which several agencies paid, we do not believe that this fact would overcome the other arguments establishing that use of the Economy Act in cost-based transactions is not "interagency financing."<sup>4</sup>

We therefore conclude that agencies may use the Economy Act to pay for facilities and services offered by TTIC and TSC and that it is within the reasonable discretion of fiscal officers to compute the "actual cost" to be charged for those facilities and services.

M. EDWARD WHELAN III  
*Principal Deputy Assistant Attorney General  
Office of Legal Counsel*

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<sup>4</sup> We do not believe that the authority under section 648, which concerns the Midway Atoll Airfield, is being used at all. We understand that the Department of Transportation has used the Economy Act to place an order with the Department of Interior for operation of the facility. In this instance, the agencies did not use the authority in section 648 to engage in "interagency financing" under any plausible understanding of the term, because only one agency bore the entire cost. The arrangement, therefore, does not illuminate what the bar on "interagency financing" might mean.

## Status of National Veterans Business Development Corporation

The National Veterans Business Development Corporation is a “Government corporation” under 5 U.S.C. § 103 and an “agency” under 31 U.S.C. § 9102.

March 19, 2004

### MEMORANDUM OPINION FOR THE GENERAL COUNSEL OFFICE OF MANAGEMENT AND BUDGET

You have asked for our opinion whether the National Veterans Business Development Corporation (“NVBDC”) is a “Government corporation” under 5 U.S.C. § 103 (2000) and an “agency” under 31 U.S.C. § 9102 (2000). We conclude that the NVBDC comes within both statutory terms.

#### I.

The Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, 113 Stat. 233, established the NVBDC as a federally chartered corporation and provided for it to be incorporated under the laws of the District of Columbia. 15 U.S.C. § 657c(a) (2000). The NVBDC is “to expand the provision of and improve access to technical assistance regarding entrepreneurship for the Nation’s veterans” and “to assist veterans . . . with the formation and expansion of small business concerns by working with and organizing public and private resources.” *Id.* § 657c(b). To carry out these purposes, the NVBDC is, among other things, to set up and maintain a network of information and assistance centers, *id.* § 657c(f), and create a “Professional Certification Advisory Board” that will devise uniform guidelines and standards for the professional certification of members of the armed services, aiding in their transition to civilian occupations and professions. *Id.* § 657c(j)(1).

The NVBDC is governed by a board of directors consisting of nine voting members and three non-voting ex officio members. *Id.* § 657c(c)(1). The voting members, not more than five of whom may be members of the same political party, are appointed by the President, after recommendations by certain members of Congress. *Id.* § 657c(c)(2). Except for some of the members first appointed, the voting members are appointed for a term of six years. *Id.* § 657c(c)(6). A voting member may not be “an officer or employee of the United States while serving as a member of the Board of Directors or [have been an officer or employee of the United States] during the 2-year period preceding such service.” *Id.* § 657c(c)(8). The non-voting members are the Administrator of the Small Business Administration, the Secretary of Defense, and the Secretary of Veterans Affairs. *Id.* § 657c(c)(3). The voting members elect from among themselves a chairperson of the Board of Directors to serve a term of two years. *Id.* § 657c(c)(5).

Congress authorized appropriations for the NVBDC for the first four years of its existence, *see id.* § 657c(k)(1), but the NVBDC may also obtain funds from sources other than the federal government. Under the Veterans Entrepreneurship Act and a subsequent appropriations bill, Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, 114 Stat. 2763 (2000), Congress established certain matching requirements so that the annual amount made available to the NVBDC from the federal government will vary according to the NVBDC's ability to secure non-federal funding. 15 U.S.C. § 657c(k)(2). The Board of Directors must "deposit all funds of the Corporation in federally chartered and insured depository institutions" until the funds are spent, *id.* § 657c(e)(1), and the statute specifies the procedures by which expenditures are to be approved, *e.g., id.* § 657c(e)(2)(A). The NVBDC is to institute a plan for raising private funds and becoming a self-sustaining corporation. *Id.* § 657c(k)(3). It must report annually to the President and Congress on its "activities and accomplishments . . . for the preceding year" and on "the efforts of Federal, State and private organizations to assist veterans in the formation and expansion of small business concerns." *Id.* § 657c(g). The NVBDC, finally, "may use the United States mails in the same manner and under the same conditions as the departments and agencies of the United States." *Id.* § 657c(i).

At issue here is the status of the NVBDC under title 5, United States Code. The Office of Management and Budget ("OMB") and the Office of Personnel Management ("OPM") have concluded that the NVBDC is a "Government corporation" under 5 U.S.C. § 103 and thus is an "Executive agency" under 5 U.S.C. § 105 (2000). *See* Letter for Yvette M. Dennis, Program Examiner, OMB, from Charles R. Henry, President and Chief Executive Officer, NVBDC (May 19, 2003) (summarizing and replying to OMB position) ("Henry Letter"); Letter for Phyllis Thompson, from James F. Hicks, Assistant General Counsel, OPM (Nov. 13, 2001). Private law firms retained by the NVBDC have given the contrary opinion. Memorandum for Charles Henry, President and Chief Executive Officer, NVBDC, from James J. McCullough, et al., Fried, Frank, Harris, Shriver & Jacobson, *Re: Applicability of 5 U.S.C. § 5373 Pay Cap to the National Veterans Business Development Corporation* (Dec. 5, 2001); Memorandum for Robert Glassman, from Jay P. Urwitz, Hale and Dorr, *Re: Authority of Corporation to Hold Closed Directors' Meeting* (June 11, 2001); *see also* Memorandum for Martin Berkowitz, Chief Financial Officer, NVBDC, from Jay Urwitz, Hale and Dorr, *Re: Inapplicability of FAR to NVBDC Procurement* (Apr. 15, 2002). Also in question is whether the NVBDC is an agency under 31 U.S.C. § 9102, which forbids an "agency" from creating a corporation to act as an agency unless authorized under a law. This issue is not specifically discussed in the papers that have been provided to us.

## II.

Under 5 U.S.C. § 103, “‘Government corporation’ means a corporation owned or controlled by the Government of the United States.”<sup>1</sup> Whether the NVBDC is a “Government corporation” would affect whether certain personnel laws would apply to the NVBDC.

Apart from the present dispute whether the NVBDC is a “Government corporation” under this statute, there can be little doubt that it is part of the United States government for purposes of the Constitution. In *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 400 (1995), the Supreme Court held that “where, as [in the case of Amtrak], the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.” Although *Lebron* dealt with a claim under the First Amendment, the Court’s decision about the constitutional status of such a corporation cannot be confined to that particular context. As we have previously concluded, “we can conceive of no principled basis for distinguishing between the status of a federal entity vis-a-vis constitutional obligations relating to individual rights and vis-a-vis the structural obligations that the Constitution imposes on federal entities.” *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 148 n.70 (1996) (citation omitted). Like Amtrak, the NVBDC was created by special law to further governmental objectives, and the President appoints not just the majority, but the entirety, of the Board of Directors.<sup>2</sup> Like Amtrak, therefore, the NVBDC is part of the United States government for constitutional purposes.

With respect to Amtrak, Congress had expressly provided that the corporation was “not . . . an agency . . . or establishment of the United States Government.” 45 U.S.C. § 541 (1988) (repealed). This provision, the Supreme Court declared, was “assuredly dispositive of Amtrak’s status as a Government entity for purposes of matters that are within Congress’s control—for example, whether it is subject to statutes that impose obligations or confer powers upon Government entities, such as the Administrative Procedure Act, and the laws governing Government procurement.” 513 U.S. at 392 (citations omitted). Here, there is no such express disclaimer. This silence raises the question whether the NVBDC should be treated as outside the government for statutory purposes under title 5.

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<sup>1</sup> A “‘Government controlled corporation’ does not include a corporation owned by the Government of the United States.” *Id.* § 103(2). In other words, title 5 clarifies that a corporation that would fall under the category “corporation owned by the Government of the United States” would not also fall under the category “Government controlled corporation.” The statute does not further define these terms.

<sup>2</sup> The non-voting ex officio members have been appointed to their underlying offices by the President. 15 U.S.C. § 657c(c)(3).

A corporation that is within the United States government for the purposes of our fundamental law is, in the ordinary sense of the word, a “Government corporation”—the phrase used in title 5. Although the opinion in *Lebron* does not state that, if a corporation is part of the United States government for constitutional purposes, it must also be considered an agency of the United States unless Congress (as in the case of Amtrak) expressly provides otherwise, we believe that when Congress has created a corporation after the decision in *Lebron*—as it has here—and, through the corporation’s structure and purpose, has placed it within the government for constitutional purposes, there is a strong presumption that the corporation is also part of the government for purposes of title 5, which deals with the internal organization of federal government agencies. “We may presume ‘that our elected representatives, like other citizens, know the law . . . .’” *Dir., Ofc. of Workers’ Comp. Progs. v. Perini North River Assocs.*, 459 U.S. 297, 319 (1983) (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979)). See also *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 117 (2002) (“Congress being presumed to have known of this settled judicial treatment”). It is anomalous for a corporation to be part of the government under the Constitution, but not to be a “Government corporation” under statute; and it is reasonable to expect that, where such an anomaly is to be created, Congress would convey its intent to do so by an express statement or, perhaps, by clear implication.<sup>3</sup>

Here, the statute, far from making such an express statement or raising such a clear implication, exhibits additional features suggesting that, even apart from the characteristics on which *Lebron* relied, the NVBDC is owned or controlled by the United States government.<sup>4</sup> The NVBDC receives federal appropriations, *cf. Irwin*,

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<sup>3</sup> In view of *Lebron*, the statutory status of corporations like the NVBDC cannot be dictated by the treatment of entities that Congress did not create “by special law, for the furtherance of governmental objectives,” see *Forsham v. Harris*, 445 U.S. 169 (1980) (privately formed entity, University Group Diabetes Program); *Gilmore v. Dep’t of Energy*, 4 F. Supp. 2d 912 (N.D. Cal. 1998) (Sandia Laboratories not created by act of Congress); *cf. United States v. Orleans*, 425 U.S. 807, 816 (1976) (employees of federal contractors not covered by Federal Tort Claims Act), or of entities a majority of whose directors are not appointed by the government, see *Irwin Mem’l Blood Bank of San Fran. Med. Soc’y v. Am. Nat’l Red Cross*, 640 F.2d 1051 (9th Cir. 1981) (analyzing Red Cross, a majority of whose board members are not appointed by the government); *cf. Pearl v. United States*, 230 F.2d 243 (10th Cir. 1956) (court finds that the Civil Air Patrol (“CAP”) is not part of the United States government for the Federal Tort Claims Act; at the time of the decision, although not mentioned by the court, the CAP Board was self-perpetuating and not appointed by the government (see 60 Stat. 346 (1946))). Similarly, the status of the NVBDC cannot be determined by the treatment of those entities that have specifically been identified in statute as not being agencies of the United States. See *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121 (D.C. Cir. 1985) (statute says that Radio Free Europe is not an agency of the United States).

<sup>4</sup> The cases from courts of appeals cited in the text relate to the definition in title 5 that applies to the Freedom of Information Act, 5 U.S.C. § 552(f)(1) (2000) (“FOIA”). There, the definition of “agency” reaches “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.” *Id.* The terms “Government corporation” and “Government controlled corporation” are defined at 5 U.S.C. § 103 “[f]or the purpose

640 F.2d at 1056 (Red Cross receives no federal appropriations), and is federally chartered, *see Rocap v. Indiek*, 539 F.2d 174, 180 (D.C. Cir. 1976) (federal charter is one indicator of federal control). It must file an annual report with Congress, “describing [among other things] the activities and accomplishments of the [NVBDC] for the preceding year.” 15 U.S.C. § 657c(g); *see Rocap*, 539 F.2d at 180 n.12 (requirement of annual report to Congress is one indicator of federal control). Congress also has regulated various aspects of the NVBDC’s day-to-day fiscal operations. Congress has specified where the NVBDC may deposit its funds. 15 U.S.C. § 657c(e)(1). Laying out procedures that must take place before those funds may be spent, Congress has required that expenditures be for “purposes that are . . . approved by the Board of Directors by a recorded vote with a quorum present,” *id.* § 657c(e)(2)(A); has limited the Board to the purposes set forth in the statute, *id.* § 657c(e)(2)(B); and has specified that a quorum consists of five voting members, *id.* § 657c(c)(11).<sup>5</sup> The NVBDC is specifically allowed to solicit and receive funds from private and governmental sources, *id.* § 657c(d)(8), and “[t]o accept voluntary and uncompensated services,” *id.* § 657c(d)(10)—permissions that may be designed to overcome the usual rules of appropriations law forbidding federal government agencies from augmenting their appropriations, *see Payment of Expenses Associated with Travel by the President and Vice President*, 6 Op. O.L.C. 214, 216 (1982); *see also* General Accounting Office, *Principles of Federal Appropriations Law* 6-103 (2d ed. 1992). Finally, the NVBDC’s purposes specifically include assisting veterans in dealing with federal agencies, including particularly the three agencies (the Small Business Administration, the Department of Defense, and the Department of Veterans Affairs) whose heads are non-voting ex officio members of the Board of Directors and thus in a position to influence how the NVBDC carries out its responsibilities. 15 U.S.C. § 657c(b)(2), (c)(3); *see id.* § 657c(c)(1) (NVBDC’s management is “vested in a Board of Directors composed of nine voting members and three nonvoting ex officio members”).

Perhaps the strongest textual argument on the other side is that the NVBDC “may use the United States mails in the same manner and under the same conditions as the departments and agencies of the United States.” 15 U.S.C. § 657c(i). A “Government corporation” under 5 U.S.C. § 103 is also a “Executive agency” under 5 U.S.C. § 105, and the statutory formulation about use of the mails, by not referring to “the *other* departments and agencies of the United States,” could be read to suggest that the NVBDC is not such an “agenc[y]” and thus not a “Government corporation.” This argument, however, cannot carry much weight. Although statutes applicable to “Executive agencies” typically would use the “other departments and agencies of the United States” language, it is not unprece-

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of this title,” and the understanding of those terms reflected in the FOIA cases is therefore relevant to the present question.

<sup>5</sup> It is left to the directors to “prescribe the manner in which the obligations of the [NVBDC] may be incurred and in which its expenses shall be allowed and paid.” 15 U.S.C. § 657c(c)(10).

dedented for the word “other” to be omitted in such statutes. *See* 12 U.S.C. § 1422b(a)(4) (2000) (the Federal Home Loan Bank Board may “use the United States mails in the same manner and under the same conditions as a department or agency of the United States”); 25 U.S.C. § 2706(b)(5) (2000) (the National Indian Gaming Commission “may use the United States mail in the same manner and under the same conditions as any department or agency of the United States”). The language here is a reasonably apt way to ensure that the Postal Service will treat the NVBDC in the same manner as entities that unquestionably are federal agencies, and we would not draw any inference from any slight imprecision in the phrasing. Other factors that could weigh against the NVBDC’s being a government corporation are that, in addition to having a federal charter, it is incorporated in the District of Columbia, *cf. Ehm v. Nat’l R.R. Passenger Corp.*, 732 F.2d 1250, 1255 (5th Cir. 1984) (in a case decided before *Lebron*, the court relies in part on the fact that Amtrak is only “nonfederally-chartered”), and that its directors, for statutory purposes, are not federal officers or employees, *see id.* (Amtrak’s officers and employees are not federal employees). Nevertheless, that Congress made the NVBDC generally subject to the corporation law of the District of Columbia means little, because the NVBDC also has a federal charter; and the exemption of its directors from the usual restrictions binding federal employees is not inconsistent with the conclusion that the entity itself is a government corporation.<sup>6</sup>

One final argument against our conclusion, advanced by the NVBDC’s President, is that the statute directs the NVBDC to “institute and implement a plan to raise private funds and become a self-sustaining corporation,” 15 U.S.C. § 657c(k)(3); that the NVBDC cannot carry out its plans to meet this directive if it is subject to the rules applicable to a government corporation, Henry Letter at 2; and that, as a result, the NVBDC’s “being designated a Government agency is clearly inconsistent with the intent of Congress,” *id.* The statute, however, reveals no judgment by Congress about the feasibility of any particular business plan or about whether the NVBDC’s current plan (or something close to it) would be essential to privatization, and an inconsistency between that plan and our conclusion does not, therefore, show that our conclusion is unfounded. Furthermore, that an entity is to be a self-sustaining corporation would not, in itself, mean that the entity is outside the government for statutory purposes. The Federal Deposit

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<sup>6</sup> Under title 31, Congress subjects “Government corporations,” as specially defined in 31 U.S.C. § 9101 (2000), to various financial controls. The special definition consists of a listing of corporations as either “mixed ownership” or “wholly owned” by the government. When Congress created the NVBDC, it did not add it to either list. The separate definition at 5 U.S.C. § 103 is independent of the definition in 31 U.S.C. § 9101, and the treatment in that section of title 31 by no means dictates the coverage under title 5. *See Ehm*, 732 F.2d at 1255 (“There is no statutory nexus between this definition [in title 31] and the definition that pertains and is expressly confined to Title 5.”); *cf. Rainwater v. United States*, 356 U.S. 590, 591-92 (1958) (coverage of Commodity Credit Corporation by the Government Corporation Control Act is relevant to whether the Corporation is part of the government for purposes of the False Claims Act, which had no separate definition).

Insurance Corporation (“FDIC”), for example, is a self-sustaining entity, funded through premiums for deposit insurance. *See, e.g.*, 12 U.S.C. § 1815(d) (2000). It is nonetheless part of the federal government for many statutory, as well as constitutional, purposes. *See, e.g., Stone v. FDIC*, 179 F.3d 1368, 1375 (Fed. Cir. 1999) (citing provisions of title 5, the court states that an FDIC employee “was a civil service employee who could not be dismissed except for cause or unacceptable performance”); *see also Dockery v. FDIC*, 64 M.S.P.R. 458, 460, 462 (1994) (FDIC is a government-controlled corporation, although not an “agency” under the “specialized meaning under 5 U.S.C. § 5102”).

### III.

Under 31 U.S.C. § 9102, which is a provision of the Government Corporation Control Act, “[a]n agency may establish or acquire a corporation to act as an agency only by or under a law of the United States specifically authorizing the action.” We believe that the NVBDC is an “agency” that, under this provision, is barred from “establish[ing] or acquir[ing] a corporation to act as an agency” unless it has specific statutory authority to do so.

Although we have not previously analyzed the scope of the term “agency” as it defines the entities ordinarily barred from establishing or acquiring corporations under 31 U.S.C. § 9102, we have considered the meaning of the term as it appears the second time in the provision (“to act as an agency”), and, under the usual canons of construction, we believe that this word should receive the same meaning in both places. The “presumption that a given term is used to mean the same thing throughout a statute” is “surely at its most vigorous when a term is repeated within a given sentence.” *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

In our fullest discussion of the meaning of “agency” in 31 U.S.C. § 9102, we concluded that a corporation established by employees of the Small Business Administration to liquidate the assets of a failed company would be acting as an “agency.” Memorandum for Susan S. Engeleiter, Administrator, Small Business Administration, from J. Michael Luttig, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Government Corporation Control Act* at 8 (June 6, 1990) (“1990 Opinion”). We noted that, in title 31, the term “agency” is defined to mean “a department, agency, or instrumentality of the United States Government.” 31 U.S.C. § 101 (2000). Applying this definition to the words in section 9102, we observed that “[i]n common usage, an instrumentality is a thing through which a person or entity acts” and that “[t]he term implies both that the thing is controlled by another actor and that the thing is or may be deliberately used to accomplish the actor’s objectives.” 1990 Opinion at 8 (footnote omitted). After reviewing the legislative history of the Government Corporation Control Act and judicial decisions about whether, in other contexts, entities were federal instrumentalities, we stated that “the test for government instrumentality status varies depending on the specific factual context and the purpose for which the determination is being

made”; that “[r]elevant factors include whether the entity was created by the government, the extent of government control over its operations, the source of the entity’s funding, the purposes for which it was created, and the functions it performs”; and that “[s]ince the purpose of the Government Corporation Control Act was to assert greater federal dominion over the financial affairs of entities controlling federal funds, the source of the entity’s funding is more important here than it might be in other contexts.” *Id.* at 11, 12. Under this test, we determined that the corporation at issue acted as an “agency” within the meaning of the statute.

In 2000, we affirmed this approach. We wrote that “[s]ubsequent federal case law, as well as an opinion of the Comptroller General, supports this analytical framework,” although we also acknowledged that these authorities “appear[ed] to recognize somewhat greater flexibility[, that is, a somewhat narrower understanding of ‘agency,’] tha[n] we ha[d] endorsed.” *Applicability of Government Corporation Control Act to “Gain Sharing Benefit” Arrangement*, 24 Op. O.L.C. 212, 219 (2000) (“2000 Opinion”). We noted that, in *Varicon Int’l v. OPM*, 934 F. Supp. 440 (D.D.C. 1996), a federal district court “[r]elying on *Lebron* . . . applied a similar multi-factor test to conclude that [a company performing background checks for the Office of Personnel Management] did not act as an agency” under 31 U.S.C. § 9102. 2000 Opinion, 24 Op. O.L.C. at 219. In that case, the entity in question was a private company owned by its employees, who were not employed by the United States; the United States had no control over the company’s board, management, or employees, except as provided in contract; the United States did not own company stock; the United States could not appoint members of the board; and the United States provided no financial assistance, except insofar as it paid for services that the company performed under contract. 934 F. Supp. at 447. We further noted that the Comptroller General “applied similar criteria,” under which instrumentalities of the United States include “‘component parts of the federal government which are vested, by law, with the authority to act on behalf of the United States, or to fulfill some statutory mission of the federal government.’” 2000 Opinion, 24 Op. O.L.C. at 220 (*quoting In re the Honorable David Pryor*, 71 Comp. Gen. 155, 158 (1992)). *See also In re the Honorable Ted Stevens*, B-278,820 (Comp. Gen. Feb. 10. 1998).<sup>7</sup>

Following the approach of our opinions, as established in 1990 and affirmed in 2000, we believe that the NVBDC is an “agency” under 31 U.S.C. § 9102. The NVBDC was “created by the government,” 1990 Opinion at 11, and is “to perform functions on behalf and for the benefit of the United States,” *id.* at 13. As discussed above, the government also exercises a considerable degree of control over

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<sup>7</sup> As we stated in 2000, “[t]he opinions and legal interpretations of the General Accounting Office and the Comptroller General often provide helpful guidance on appropriations matters and related issues,” but “are not binding upon departments, agencies, or officers of the executive branch.” 2000 Opinion, 24 Op. O.L.C. at 216 n.3 (citing *Bowsher v. Synar*, 478 U.S. 714, 727-32 (1986)).

the NVBDC. The President appoints the entire Board of Directors, and high-level federal officials serve on the Board, albeit as non-voting members, and thus have a direct role in the NVBDC's management. The United States, moreover, regulates the NVBDC's fiscal operations, as outlined above. Finally, the "source of the entity's funding is more important here than it might be in other contexts," 1990 Opinion at 12, and the NVBDC receives federal appropriations, even as it seeks to develop private sources of funds. We therefore conclude that the NVBDC is an "agency" subject to the statutory bar in section 9102 against establishing or acquiring a corporation without specific statutory authority.

M. EDWARD WHELAN III

*Principal Deputy Assistant Attorney General  
Office of Legal Counsel*

## Authority of Agency Officials to Prohibit Employees From Providing Information to Congress

Consistent with longstanding Executive Branch positions, Department of Health and Human Services officials have the authority to prohibit officers or employees of the Department from providing information to Congress.

May 21, 2004

### LETTER OPINION FOR THE GENERAL COUNSEL DEPARTMENT OF HEALTH AND HUMAN SERVICES

This letter replies to your request for our response to a memorandum recently issued by the Congressional Research Service. *See* Memorandum for Honorable Charles Rangel, House Committee on Ways and Means, from Jack Maskell, Legislative Attorney, American Law Division, Congressional Research Service, *Re: Agency Prohibiting a Federal Officer from Providing Accurate Cost Information to the United States Congress* (Apr. 26, 2004) (“CRS Memo”). The CRS Memo concludes that senior administrators within the Department of Health and Human Services (“HHS”) “do not have the right to prevent or prohibit their officers or employees, either individually or in association, from presenting information to the United States Congress, its Members or committees, concerning relevant public policy issues.” *Id.* at CRS-1 to CRS-2. We believe, consistent with longstanding Executive Branch legal positions, that HHS officials do indeed have such authority.

The CRS position is based principally on the Lloyd–LaFollette Act, 5 U.S.C. § 7211 (2000), and the appropriations riders currently enacted as sections 618 and 620 of the Transportation, Treasury, and Independent Agencies Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 279, 354, 355. CRS interprets these statutes to establish “that a federal employee has the right to communicate with and to provide information to the United States Congress, or to a Member or committee of Congress, and that such right may not be interfered with or impeded.” CRS Memo at CRS-3. CRS insists that “[t]here are no countervailing ‘separations [sic] of powers’ indications generally, nor legitimate ‘executive privilege’ claims specifically, to justify in this matter the withholding from the United States Congress [of] relevant public policy information by an executive branch officer in a federal agency or department lower down in the chain of command from the President.” *Id.* at CRS-2. There are two fundamental errors in the CRS analysis: (1) its summary dismissal of separation of powers concerns and (2) its incorrectly narrow view of the scope of executive privilege.<sup>1</sup>

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<sup>1</sup> CRS also discusses whether the Chief Actuary has a statutory responsibility to provide cost estimates and other assistance to Congress. *See* CRS Memo at CRS-6 to CRS-7. That question is

**I.**

There are serious separation of powers considerations that bear directly on the proper interpretation of the statutes relied upon by CRS. The longstanding Executive Branch position is decidedly contrary to the CRS view. The Executive Branch position was perhaps most succinctly summarized in the Statement of Administration Policy (“SAP”) that the Clinton Administration issued on March 9, 1998. The SAP stated that the Administration had determined that S. 1668, a bill purporting to direct the President to inform employees in the intelligence community that they had a right to disclose classified information to Congress without authorization, was an unconstitutional violation of separation of powers principles and, if presented to the President, would be the subject of a veto recommendation from his senior advisors. The SAP went on to say that:

This provision is clearly contrary to the Supreme Court’s explicit recognition of the President’s constitutional authority to protect national security and other privileged information. Congress may not vest lower-ranking personnel in the Executive branch with a “right” to furnish national security or other privileged information to a member of Congress without receiving official authorization to do so. By seeking to divest the President of his authority over the disclosure of such information, S. 1668 would unconstitutionally infringe upon the President’s constitutional authority.

This position was more fully articulated in Office of Legal Counsel testimony. *See Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92 (1998) (“Moss Testimony”).

The Clinton Administration SAP and the Moss Testimony relied on longstanding Department of Justice positions developed in connection with the statutory provisions on which CRS relies. Those positions were articulated in a brief the Solicitor General filed in the Supreme Court in 1989 in *Am. Foreign Serv. Ass’n v. Garfinkel*, 488 U.S. 923 (1988) (No. 87-2127). That brief was cited in the Moss Testimony, 22 Op. O.L.C. at 92 n.1, and summarized in a 1996 OLC opinion, *Access to Classified Information*, 20 Op. O.L.C. 402, 402–05 (1996). The 1989 Solicitor General brief and the 1996 OLC opinion explained why, under separation of powers principles, Congress may not bypass the procedures the President establishes to authorize the disclosure to Congress of classified and other privileged information by vesting lower-level employees with a right to disclose such information to Congress without authorization. Accordingly, the Department ad–

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addressed in the legal opinion provided to the Office of the HHS Inspector General by HHS’s Office of General Counsel on May 12, 2004.

vised that it would not interpret the statutes cited by CRS here as vesting such a right in Executive Branch employees. *Id.* at 404–05.

The position presented in the Clinton Administration SAP (see reference to “other privileged information”) and the Moss Testimony, 22 Op. O.L.C. at 101 n.34, was not limited to classified information, but extended to all deliberative process or other information protected by executive privilege. Because these statutes may not override the constitutional doctrine of executive privilege, they may not act to prohibit the supervision of the disclosure of any privileged information, be it classified, deliberative process or other privileged material. See Memorandum for Peter J. Wallison, Counsel to the President, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, at 3 n.6 (Sept. 8, 1986) (“Consistent with our view that Congress cannot override executive privilege by statutory enactment, we do not believe the ‘whistleblower’ provisions allow an employee to escape sanctions for disclosure of material covered by executive privilege.”). See also Memorandum for Robert M. McNamara, Jr., General Counsel, Central Intelligence Agency, from Todd D. Peterson, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Legal Authority to Withhold Information from Congress* at 3 (Sept. 9, 1998) (“application of [statutory] reporting requirements . . . is limited by a constitutional restraint—the executive branch’s authority to control the disclosure of information when necessary to preserve the Executive’s ability to perform its constitutional responsibilities”).

The foregoing discussion does not mean that an agency’s right to supervise its employees’ disclosures to Congress is limited to privileged information. The discussion establishes only that the CRS interpretation that the “right of disclosure” statutes prohibit Executive Branch supervision of employee disclosures unconstitutionally limits the ability of the President and his appointees to supervise and control the dissemination of privileged government information. However, the CRS position also unconstitutionally limits the President’s ability to supervise and control the work of subordinate officers and employees of the Executive Branch more generally. See *Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress*, 6 Op. O.L.C. 632, 633 (1982) (statutory “requirement that subordinate officials within the Executive Branch submit reports directly to Congress, without any prior review by their superiors, would greatly impair the right of the President to exercise his constitutionally based right to control the Executive Branch”; provision would be unconstitutional if so construed); *Authority of the Special Counsel of the Merit Systems Protection Board to Litigate and Submit Legislation to Congress*, 8 Op. O.L.C. 30, 31 (1984) (“Congress may not grant [Special Counsel] the authority to submit legislative proposals directly to Congress without prior review and clearance by the President, or other appropriate authority, without raising serious separation of powers concerns”).

This second, “unitary Executive” position is based on the following rationale:

The [judicial] decisions and the long practical history concerning the right of the President to protect his control over the Executive Branch are based on the fundamental principle that the President's relationship with his subordinates must be free from certain types of interference from the coordinate branches of government in order to permit the President effectively to carry out his constitutionally assigned responsibilities. The executive power resides in the President, and he is obligated to "take care that the laws are faithfully executed." In order to fulfill those responsibilities, the President must be able to rely upon the faithful service of subordinate officials. To the extent that Congress or the courts interfere with the President's right to control or receive effective service from his subordinates within the Executive Branch, those other branches limit the ability of the President to perform his constitutional function.

6 Op. O.L.C. at 638-39. Based on this rationale, we do not believe that the statutes relied upon by CRS could constitutionally be applied, as CRS would apply them, to the circumstance where a government official instructs a subordinate government employee not to provide an administration's cost estimates to Congress, whether or not the estimates are viewed as privileged.<sup>2</sup>

## II.

CRS's dismissal of any separation of powers concerns with its reading of the "right of disclosure" statutes is exacerbated by its much too narrow view of the scope of executive privilege. CRS cites *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997), for the proposition that "executive privilege does 'not extend to staff outside the White House in executive branch agencies,' covering only those with 'operational proximity' to the President." CRS Memo at CRS-2 n.7. This mischaracterizes *Sealed Case*, a case addressing the scope of the presidential communications component of executive privilege, as a case defining the overall scope of executive privilege. To the contrary, the holdings of *Sealed Case* were limited to the presidential communications privilege, and not only did the court not seek to define the scope of other components of executive privilege, but it also explicitly identified another component of executive privilege, the deliberative process privilege, which is the component applicable in the HHS actuarial-estimates context that occasioned the CRS Memo. *See Sealed Case*, 121 F.3d at 737 ("The most frequent form of executive privilege raised in the judicial arena is the deliberative process privilege"). The court contrasted the two privileges, indicating that "one applies to decisionmaking of executive officials generally, the other

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<sup>2</sup> As discussed in the HHS legal opinion, the Chief Actuary is not "independent" for purposes of presidential or HHS supervision over the disclosure of HHS records or information to Congress.

specifically to decisionmaking of the President.” *Id.* at 745.<sup>3</sup> *See also Judicial Watch v. Dep’t of Justice*, 365 F.3d 1108, 1109 (D.C. Cir. 2004) (referring to the deliberative process and presidential communications privileges as “two privileges falling within [the executive privilege] doctrine”); *id.* at 1113–14 (“the deliberative process privilege . . . is a general privilege that applies to all executive branch officials”).

This principle that the deliberative process component of executive privilege applies government-wide, and is not limited to presidential decisionmaking, was also recognized implicitly in the leading Supreme Court decision on executive privilege, *United States v. Nixon*, 418 U.S. 683, 705 (1974) (recognizing “the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties”), and it has been the basis for numerous executive privilege assertions in the last 50 years concerning intra-agency deliberations, including deliberations involving lower-level agency officials. The history of those assertions as of 1991 is chronicled in a Department of Justice letter, which also chronicles Department of Justice legal positions. *See* Letter to Honorable Howard M. Metzenbaum, United States Senate, from W. Lee Rawls, Assistant Attorney General, Office of Legislative Affairs (July 1, 1991). Subsequent to that letter, Presidents George Bush, Bill Clinton and George W. Bush each asserted executive privilege against congressional committees to protect intra-agency deliberative materials prepared for senior officers in executive departments below the President.<sup>4</sup>

JACK L. GOLDSMITH III  
*Assistant Attorney General*  
*Office of Legal Counsel*

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<sup>3</sup> The court noted in *Sealed Case* that executive privilege claims in the congressional context historically have generally concerned deliberative process privilege rather than presidential communications privilege. *See id.* at 739 (“Presidential claims of a right to preserve the confidentiality of information and documents figured more prominently in executive-congressional relations, but these claims too were most often essentially assertions of the deliberative process privilege.”).

<sup>4</sup> Although we cannot opine on the privileged status of particular documents without reviewing the documents themselves, we can say that the estimates an administration develops for its internal use in considering policy options should generally be considered privileged because they reflect the deliberative process.

## Applicability of Anti-Discrimination Statutes to the Presidio Trust

The issue the Presidio Trust has presented is of the sort that Executive Order 12146 calls upon the Attorney General, and hence the Office of Legal Counsel, to resolve.

The Presidio Trust is exempt from section 717 of Title VII of the Civil Rights Act of 1964 and section 15 of the Age Discrimination in Employment Act of 1967 to the extent that these statutes apply to the appointment, compensation, duties, or termination of Trust employees, but not otherwise.

June 22, 2004

### MEMORANDUM OPINION FOR THE GENERAL COUNSEL PRESIDIO TRUST

Congress established the Presidio Trust (the “Trust”) in 1996 as a wholly-owned federal government corporation charged with administering historic buildings and property that were formerly part of the Presidio of San Francisco military base.<sup>1</sup> Section 103(c)(7) of the Presidio Trust Act authorizes the Trust

[n]otwithstanding any other provision of law, . . . to appoint and fix the compensation and duties and terminate the services of an executive director and such other officers and employees as it deems necessary without regard to the provisions of title 5, United States Code, or other laws related to the appointment, compensation or termination of Federal employees.

16 U.S.C. § 460bb note (2000). The Trust has asked us to determine whether in this provision Congress has exempted it from section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(a) (“Title VII”), and section 15 of the Age Discrimination in Employment Act of 1967 (“ADEA”), 29 U.S.C. § 633a.<sup>2</sup> We first address the argument of the Equal Employment Opportunity Commission (“EEOC”) that, pursuant to Executive Order 12146 (“EO 12146”), we should refrain from resolving the question before us. We conclude that the issue presented by the Trust is of the sort that EO 12146 calls upon the Attorney General, and

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<sup>1</sup> See Omnibus Parks and Public Lands Management Act of 1996, Pub. L. No. 104-333, tit. I, § 103(c)(7), 110 Stat. 4093 (codified at 16 U.S.C. § 460bb note) (“Presidio Trust Act”).

<sup>2</sup> Our opinion on this matter is informed by letters from both the Trust and the EEOC setting forth their respective views on this issue. See Letter for Edward Whelan, Acting Assistant Attorney General, Office of Legal Counsel, from Karen Cook, General Counsel, Presidio Trust (Apr. 25, 2003) (“Presidio Request”); Letter for Noel J. Francisco, Deputy Assistant Attorney General, Office of Legal Counsel, from Karen A. Cook, General Counsel, Presidio Trust (Aug. 8, 2003); Letter for Noel J. Francisco, Deputy Assistant Attorney General, Office of Legal Counsel, from David L. Frank, Legal Counsel, Equal Employment Opportunity Commission (July 25, 2003) (“EEOC Response”); Letter for Noel J. Francisco, Deputy Assistant Attorney General, Office of Legal Counsel, from Peggy R. Mastroianni, Associate Legal Counsel, Equal Employment Opportunity Commission (Oct. 8, 2003).

hence this Office, to resolve. Turning to the merits, we conclude that in enacting section 103(c)(7) of the Trust's organic statute, Congress exempted the Trust from section 717 of Title VII and section 15 of the ADEA to the extent that these statutes apply to the appointment, compensation, duties, or termination of Trust employees, but not otherwise.<sup>3</sup>

## I.

We first address the threshold question whether it is appropriate for us to resolve the question before us under EO 12146, 44 Fed. Reg. 42,657 (1979); 28 U.S.C. § 509 note (2000). The EEOC argues that “a dispute arising out of an adjudicatory process, in which one agency, who is a party to the adjudication, disagrees with the decision of the other agency, who is the adjudicator, is [not] the kind of dispute between agencies that the Executive Order intended the Attorney General to resolve.” EEOC Response, *supra* note 2, at 2. We have previously (and recently) rejected this contention. *See Authority of the Equal Employment Opportunity Commission to Impose Monetary Sanctions Against Federal Agencies for Failure to Comply With Orders Issued by EEOC Administrative Judges*, 27 Op. O.L.C. 24, 25 (Jan. 6, 2003) (“*EEOC Monetary Sanctions*”) (“[N]either the fact that EEOC has authority to enforce Title VII in the federal workplace nor the fact that agencies ‘shall’ comply with EEOC rules and orders, *see* 42 U.S.C. § 2000e-16(b) (2000), divests us of authority to issue this opinion.”). We adhere to that position.

We believe that the dispute before us is of the sort that this Office is charged with resolving. As we explained in our *EEOC Monetary Sanctions* opinion, EO 12146 specifically calls upon the Attorney General to review an interagency dispute over whether one agency has jurisdiction to regulate the activities of another. In particular, section 1-401 of the Executive Order provides:

Whenever two or more Executive agencies are unable to resolve a legal dispute between them, *including the question of which has jurisdiction to administer a particular program or to regulate a particular activity*, each agency is encouraged to submit the dispute to the Attorney General.

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<sup>3</sup> We have limited our analysis to section 717 of Title VII and section 15 of the ADEA because, insofar as we are aware, these are the only employment discrimination statutes under which the EEOC has asserted jurisdiction over the Trust. *See Newman v. Rosenblatt*, EEOC Appeal No. 01A24736, 2004 WL 602178 (Mar. 18); *Newman v. Rosenblatt*, EEOC Appeal No. 01A24736, 2003 WL 1624696 (Mar. 18). We do not address whether the Trust is subject to other employment laws, which may or may not have features that distinguish them from sections 717 and 15 for purposes of applying the section 103(c)(7) exemption. *See, e.g.*, 29 U.S.C. § 791 (2000) (Rehabilitation Act); 29 U.S.C. § 206(d) (2000) (Equal Pay Act).

44 Fed. Reg. at 42,658 (emphasis added). The Trust’s request falls within the plain language of this provision. The Trust specifically raises “the question . . . [whether the EEOC] has jurisdiction to . . . regulate a particular activity”—here, certain employment decisions made by the Trust—an issue with respect to the resolution of which the Trust and the EEOC are in disagreement.<sup>4</sup> As we stated in our *EEOC Monetary Sanctions* opinion, “[a]t its base, the present dispute is whether EEOC has exceeded its own jurisdiction; the dispute is therefore entirely appropriate for resolution by this Office.” 27 Op. O.L.C. at 25 (citing EO 12146, § 1-401). And since the Attorney General has delegated to this Office his authority to exercise the functions delegated him under the Executive Order, *see* 28 C.F.R. § 0.25 (2003), we believe that section 1-401 of the Executive Order clearly permits us to resolve this issue.

The EEOC, however, argues that section 1-402 of EO 12146 divests us of authority to resolve this dispute. Section 1-402 provides:

Whenever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is specific statutory vesting of responsibility for a resolution elsewhere.

44 Fed. Reg. at 42,658. As we understand the EEOC’s argument, where “there is specific statutory vesting of responsibility for a resolution” of a legal dispute in an agency other than the Department of Justice, then section 1-402 prohibits the Department of Justice from resolving that dispute even if requested to do so pursuant to section 1-401. And because, the EEOC argues, both it and the courts are vested with responsibility for resolving disputes under the federal employment discrimination laws involving employees of the federal government, *see* 42 U.S.C. § 2000e-16(b), (c) (Title VII); 29 U.S.C. § 633a(b), (c) (ADEA), section 1-402 prohibits the Attorney General from resolving legal issues arising out of these disputes. *See* EEOC Response, *supra* note 2, at 2.

We disagree with the EEOC’s interpretation of section 1-402 of the Executive Order. Even assuming *arguendo* that “there is specific statutory vesting of responsibility [in the EEOC and the courts] for a resolution” of the issue raised by the Trust, all that section 1-402 does is establish a requirement that agencies must

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<sup>4</sup> The EEOC has suggested that there is no interagency dispute within the meaning of section 1-401, reasoning that “[s]ince the Presidio Trust raised the jurisdictional issue in an appeal over which the EEOC has adjudicatory authority, EEOC is not ‘unable to resolve’ . . . this dispute within the meaning of section 1-401.” EEOC Response, *supra* note 2, at 2. As we explain, however, we are not addressing the EEOC’s resolution of a specific employment discrimination claim, but rather are resolving an ongoing general statutory dispute between two agencies. And as the submissions to us from the Trust and the EEOC make clear, *see id.* n.2, the Trust and the EEOC have not resolved their dispute on this broader legal issue.

satisfy before they are permitted to bring an action in court. As section 1-402 states, executive agencies “shall submit the [interagency legal] dispute to the Attorney General prior to proceeding in court, except where there is specific statutory vesting of responsibility for a resolution elsewhere.” 44 Fed. Reg. at 42,658. In other words, if an agency has already utilized an alternative, statutorily-created mechanism for resolving an interagency legal dispute, the agency may, consistent with section 1-402, “proceed[] in . . . court” without also asking the Attorney General to resolve the dispute. *Id.* This process for resolving interagency disputes helps avoid the constitutionally dubious scenario that arises when the Executive Branch seeks to have a court resolve its internal legal disputes.<sup>5</sup> Nothing in section 1-402, however, prohibits an agency from seeking the Attorney General’s opinion on a legal issue, or the Attorney General from rendering such an opinion if asked, even where another entity is likewise vested with responsibility for resolving that dispute.

This understanding of section 1-402 finds support in a previous opinion issued by this Office. See *Application of the Davis-Bacon Act to Urban Development Projects That Receive Partial Federal Funding*, 11 Op. O.L.C. 92 (1987) (“*Davis-Bacon*”). There, we addressed whether section 1-402 modified our authority to resolve a dispute under 28 U.S.C. § 512 (2000), which authorizes “[t]he head of an executive department [to] require the opinion of the Attorney General on questions of law arising in the administration of his department.” 11 Op. O.L.C. at 95.<sup>6</sup> The Secretary of Housing and Urban Development had requested our opinion, but the Department of Labor argued that because it was statutorily vested with authority to resolve the legal issue before us, section 1-402 precluded the Attorney General from resolving the issue.

We rejected this argument, explaining that all that section 1-402 did was impose a requirement on the agencies between which the legal dispute had arisen:

Even assuming, however, that Reorganization Plan No. 14 of 1950—directing the Secretary of Labor to prescribe appropriate labor-related standards, regulations, and procedures—constitutes “specific

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<sup>5</sup> We have frequently noted serious constitutional questions presented—both under principles of a unitary executive and Article III justiciability—when the Executive Branch seeks to have a court resolve its internal legal disputes. See, e.g., *Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act*, 21 Op. O.L.C. 109 (1997) (“*Clean Air Act*”); *Authority of Department of Housing and Urban Development to Initiate Enforcement Actions Under the Fair Housing Act Against Other Executive Branch Agencies*, 18 Op. O.L.C. 101 (1994); *Proposed Tax Assessment Against the United States Postal Service*, 1 Op. O.L.C. 79 (1977). Indeed, the Solicitor General recently asked the Supreme Court to vacate an Eleventh Circuit decision that held justiciable a dispute between two Executive Branch agencies. See *TVA v. EPA*, 278 F.3d 1184, 1193–98 (11th Cir. 2002), *rev’d on other grounds*, 336 F.3d 1236 (11th Cir. 2003), *cert. denied sub nom. Leavitt v. TVA*, 124 S. Ct. 2096 (2004).

<sup>6</sup> Because we conclude that we may resolve this issue under EO 12146, we need not address whether we may also do so under 28 U.S.C. § 512 or any other authority.

statutory vesting of responsibility for a resolution” of the present dispute within the Secretary of Labor, the reorganization legislation in no sense affects the authority of the head of an executive department to seek, or the Attorney General to render, an opinion under 28 U.S.C. § 512 on questions of law that arise in the administration of his department. Rather, under the above assumption, Reorganization Plan No. 15 of 1950 at most would mean that § 1-402 of Executive Order No. 12146 does not *require* the Secretaries of HUD and Labor to submit this legal dispute to the Attorney General.

*Id.* at 97 (emphasis in original). Section 1-402 did not, however, prohibit an agency from seeking the views of the Attorney General. Nor did it prohibit the Attorney General from providing his views upon request. So too here. Assuming *arguendo* that the EEOC and the courts are statutorily vested with resolving the issue that the Trust has raised, the most that can be said of section 1-402 is that it does not require the EEOC and the Trust to seek resolution of this issue by the Attorney General before proceeding in court. It does not, however, preclude the Attorney General from rendering such an opinion if requested to do so in accordance with section 1-401 of EO 12146.

We recognize that notwithstanding the foregoing analysis, some dicta in one of our other opinions might be construed to suggest that section 1-402 prohibits this Office from resolving a dispute under section 1-401 if another agency is statutorily vested with responsibility for resolving that dispute. *See* Memorandum for Henry L. Solano, Solicitor, Department of Labor, and Leigh A. Bradley, General Counsel, Department of Veterans Affairs, from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, *Re: The Effect of Veterans' Health Administration Nurses' Additional Pay for Sunday and Night Duty on Calculation of Workers' Compensation Benefits* (Jan. 19, 2001) (“*Night Duty*”). There, the Department of Labor argued that it, rather than this Office, was vested with responsibility for resolving a dispute with the Department of Veterans Affairs (“VA”) over the proper computation of workers’ compensation benefits for certain VA employees. We rejected this argument for two reasons: First, the statutes cited by the Department of Labor did not vest in it responsibility for deciding the dispute before us. *Id.* at 3–7. Second, even if the statutes had vested responsibility for deciding the dispute in the Department of Labor, we had separate authority to resolve it under 28 U.S.C. § 512. *Night Duty* at 7 (citing *Davis-Bacon*, 11 Op. O.L.C. 92). Nevertheless, we observed without analysis that under section 1-402, “we have authority to decide this question unless [the statutes cited by Labor] vest[] responsibility for resolution in DOL.” *Id.* at 3 (emphasis added). This dicta could be construed as suggesting that section 1-402 did not just impose a requirement upon agencies between which an interagency legal dispute has arisen, but in addition, that it limited the Attorney General’s authority to resolve that dispute even if requested to do so under section 1-401 of the Order. In view of the

foregoing analysis, as well as the absence of any substantive explanation for our apparent suggestion in the *Night Duty* opinion, we hereby disavow the *Night Duty* dicta to the extent that it suggests that the Attorney General’s authority to resolve interagency disputes when properly requested to do so pursuant to section 1-401 of the Executive Order is limited by section 1-402.

In any event, the EEOC and the courts are not statutorily vested with resolving the issue raised by the Trust. Sections 717(b) and (c) of Title VII, 42 U.S.C. § 2000e-16(b), (c), upon which the EEOC relies, authorize the EEOC and the courts to resolve specific complaints of employment discrimination alleged by employees of the federal government. The Trust, however, is not asking us to review the EEOC’s resolution of any of these specific complaints. Rather, the Trust is asking us to address the broad and generic legal question whether it is subject to the EEOC’s jurisdiction pursuant to section 103(c)(7) of its organic statute—a question upon which “there is [not] a specific statutory vesting of responsibility for a resolution” in the EEOC or the courts. 44 Fed. Reg. at 42,658.

Other portions of our *Night Duty* opinion illustrate this distinction. One of the statutes upon which the Department of Labor relied in its argument that this Office lacked authority to resolve its legal dispute with the Department of Veterans Affairs provided that the Secretary of Labor’s decision “allowing or denying a payment” is “final and conclusive” and “not subject to review by another official of the United States.” 5 U.S.C. § 8128(b) (2000). As we explained:

It is clear to us that this provision does not apply to this dispute. Section 8128(b) on its face addresses the Secretary of Labor’s exclusive jurisdiction to determine specific adjudications of claims for benefits arising under FECA. Because the issue presented to us is a broad statutory dispute between two agencies rather than an administrative adjudication on a specific claim for benefits, it does not present the type of determination intended to be insulated from review under [section] 8128.

*Night Duty* at 4. The same is true here. We are not resolving the EEOC’s resolution of “an administrative adjudication on a specific claim” brought by an employee against his federal employer, but rather, “a broad statutory dispute between two agencies.” *Id.* The latter is simply not the type of dispute that the EEOC is charged with resolving. See *EEOC Monetary Sanctions*, 27 Op. O.L.C. 24; *Reconsideration of Applicability of the Davis-Bacon Act to the Veterans Administration’s Lease of Medical Facilities*, 18 Op. O.L.C. 109, 122–23 (1994) (Department of Labor’s authority to administer statute does not supersede Attorney General’s authority to resolve legal dispute between agencies); *Clean Air Act*, 21 Op. O.L.C. at 116–17 (rejecting argument that statute precludes resolution of dispute by Attorney General).

We therefore conclude that this Office is fully authorized to resolve the legal dispute that the Trust has presented to us.

## II.

Having determined that we have authority to resolve this dispute, we now turn to whether Congress has exempted the Trust from section 717 of Title VII and section 15 of the ADEA. *See* 42 U.S.C. § 2000e-16; 29 U.S.C. § 633a. In section 103(c)(7) of the Trust’s organic statute, as amended, Congress provided:

Notwithstanding any other provision of law, the Trust is authorized to appoint and fix the compensation and duties and terminate the services of an executive director and such other officers and employees as it deems necessary without regard to the provisions of title 5, United States Code, or *other laws related to the appointment, compensation or termination of Federal employees.*

16 U.S.C. § 460bb note (emphasis added). Both the Trust and the EEOC seem to agree that, but for the language emphasized above, the Trust would be subject to sections 717 and 15. *See* Presidio Request, *supra* note 2, at 14; EEOC Response, *supra* note 2, at 3–4. The precise question before us, however, is whether sections 717 and 15 are “other laws related to the appointment, compensation or termination of Federal employees” within the meaning of the Trust’s organic statute. If they are, then in enacting this language, Congress exempted the Trust from these otherwise applicable laws.

As a definitional matter, there can be no doubt that section 717 and section 15 fall within the general category of laws “related to the appointment, compensation or termination of Federal employees.” Section 717 requires “[a]ll personnel actions [of the federal government] affecting employees or applicants for employment . . . [to] be made free from any discrimination based on race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-16(a). The ADEA similarly requires “[a]ll personnel actions [of the federal government] affecting employees or applicants for employment who are at least 40 years of age . . . [to] be made free from any discrimination based on age.” 29 U.S.C. § 633a(a). The “personnel actions” referenced in Title VII and the ADEA plainly include “the appointment, compensation or termination of federal employees.”

That these federal employment discrimination laws are “related” to the “appointment, compensation or termination of Federal employees,” however, does not necessarily resolve the question before us. “[U]nder the established interpretive canons of *noscitur a sociis* and *ejusdem generis*, ‘[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.’” *Wash. Dep’t of Soc. & Human Serv. v. Guardianship*

*Estate of Danny Keffeler*, 537 U.S. 371, 384 (2003) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001)). In *Keffeler*, the Court addressed a provision in the Social Security Act protecting benefits from “execution, levy, attachment, garnishment, or other legal process.” *Id.* at 382. The Court rejected the state court’s holding that “other legal process” in this context covers a state agency’s use of benefits to reimburse itself as representative payee. While recognizing that “in the abstract the department does use legal process as the avenue to reimbursement,” the Court interpreted that phrase more restrictively in its context to include only those processes similar to the judicial processes of execution, levy, attachment and garnishment. *Id.* at 384. *See also Circuit City*, 532 U.S. at 112 (Federal Arbitration Act exemption for “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” covers only transportation workers, not all contracts under Congress’s commerce power). Here, the relevant phrase—“other laws related to the appointment, compensation or termination of Federal employees”—is preceded by the phrase “the provisions of title 5, United States Code.” Under the *noscitur a sociis* and *ejusdem generis* canons, therefore, it might well be argued that only those laws “similar in nature” to the provisions in title 5 are within the general “other laws” referenced in section 103(c)(7).

Even under these interpretive principles, however, we think it clear that section 717 and section 15 are “other laws” within the meaning of section 103(c)(7). In particular, two features common between “the provisions of title 5, United States Code,” on the one hand, and section 717 and section 15, on the other, lead us to the conclusion that they are generally similar to one another for purposes of applying the *noscitur a sociis* and *ejusdem generis* canons.

Perhaps most significantly, the salient feature of title 5 is that it sets forth laws that apply exclusively to federal employment. Title 5 as a whole is entitled “Government Organization and Employees.” Its provisions establish the basic structure of the federal government. Part III of title 5, moreover, deals exclusively with federal employment. Title 5, in other words, contains “laws related to the appointment, compensation or termination of Federal employees.” 16 U.S.C. § 460bb note (emphasis added). The “other laws” referenced in section 103(c)(7), therefore, surely include laws that, like title 5, relate exclusively to federal employment. Like title 5, however, the provisions of section 717 of Title VII and section 15 of the ADEA relate exclusively to “Federal employees.” *Id.*

Section 717 is illustrative. Title VII’s general antidiscrimination provision applies only to “employers,” *see* 42 U.S.C. § 2000e-2 (2000) (prohibiting an “employer” from unlawful discrimination on the basis of race, color, religion, sex or national origin), a term that expressly excludes the federal government, *see* 42 U.S.C. § 2000e(b) (defining “employer” to exclude “the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service”). In contrast, section 717 applies only to the federal

government. In particular, section 717(a), added to the statute in 1972 (before which the federal government was entirely exempt from Title VII's antidiscrimination requirements), provides:

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, . . . and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-16(a) (2000). As this provision makes clear, section 717 is not a general employment discrimination law that happens also to apply to the federal government. Rather, it is a law that, like title 5, applies specifically to federal employment. It is, in other words, an “other law[] related to the appointment, compensation or termination of Federal employees.” 16 U.S.C. § 460bb note.

The same is true of section 15 of the ADEA, which in relevant respects is identical to section 717 of Title VII. As in Title VII, the ADEA's general antidiscrimination provision applies to “employers,” *see* 29 U.S.C. § 623(a) (2000) (prohibiting an “employer” from unlawful discrimination on the basis of age), a term that expressly excludes the federal government, *see* 29 U.S.C. § 633(b) (defining “employer” to exclude “the United States, or a corporation wholly owned by the Government of the United States”). And as with section 717 of Title VII, section 15, added to the ADEA in 1974 (before which the federal government was entirely exempt from the ADEA), applies only to the federal government:

All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . in military departments . . . , in executive agencies . . . , in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on age.

29 U.S.C. § 633a(a). This section also incorporates the remedial and procedural provisions contained in section 717 of Title VII. *Id.* § 633a(a), (b).

The most salient feature of title 5, in other words, is replicated in section 717 of Title VII and section 15 of the ADEA: All three are “laws related to the appointment, compensation or termination of Federal employees.” 16 U.S.C. § 460bb note. Indeed, all three apply exclusively to federal employment. In this light, it is difficult to distinguish these statutes in any meaningful way.

Section 717 and section 15 are also similar to title 5 in a second important respect: All three seek to prohibit *employment discrimination* in the federal government. As discussed above, sections 717 and 15 provide that “personnel actions affecting employees or applicants for [federal] employment” “shall be made free from any discrimination based on race, color, religion, sex, or national origin” and “free from any discrimination based on age,” respectively. 42 U.S.C. § 2000e-16(a); 29 U.S.C. § 633a(a). Likewise, chapter 72, subchapter I of title 5, entitled “Antidiscrimination in Employment,” provides, among other things, that “[i]t is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, sex, or national origin,” further stating that “[t]he President shall use his existing authority to carry out this policy.” 5 U.S.C. § 7201(b) (2000). It has similar provisions related to discrimination on the basis of marital status, *see* 5 U.S.C. § 7202 (2000),<sup>7</sup> and disability, *see* 5 U.S.C. § 7203 (2000).<sup>8</sup> *See also* 5 U.S.C. § 7204(b) (2000) (“In the administration of chapter 51, subchapters III and IV of chapter 53, and sections 305 and 3324 of this title, discrimination[] because of race, color, creed, sex, or marital status is prohibited with respect to an individual or a position held by an individual.”). Section 717, section 15, and title 5, in other words, all seek to prohibit employment discrimination by the federal government.

In short, it is difficult to distinguish section 717 of Title VII and section 15 of the ADEA from title 5 on any principled basis. All three regulate employment in the federal government and, more specifically, all three prohibit the federal government from engaging in specified categories of employment discrimination.

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<sup>7</sup> Section 7202 provides: “(a) The President may prescribe rules which shall prohibit, as nearly as conditions of good administration warrant, discrimination because of marital status in an Executive agency or in the competitive service. (b) Regulations prescribed under any provision of this title, or under any other provision of law, granting benefits to employees, shall provide the same benefits for a married female employee and her spouse and children as are provided for a married male employee and his spouse and children. (c) Notwithstanding any other provision of law, any provision of law providing a benefit to a male Federal employee or to his spouse or family shall be deemed to provide the same benefit to a female Federal employee or to her spouse or family.”

<sup>8</sup> Section 7203 provides: “The President may prescribe rules which shall prohibit, as nearly as conditions of good administration warrant, discrimination because of handicapping condition in an Executive agency or in the competitive service with respect to a position the duties of which, in the opinion of the Office of Personnel Management, can be performed efficiently by an individual with a handicapping condition, except that the employment may not endanger the health or safety of the individual or others.”

Nor does anything in either the statutory or legislative history suggest that section 103(c)(7)'s reference to "other laws" is not intended to encompass section 717 of Title VII and section 15 of the ADEA. In its original form, section 103(c)(7) of the Presidio Trust Act authorized the Trust to appoint and fix the compensation and duties of an executive director and such other officers and employees as it deems necessary without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and [to] pay them without regard to the provisions of chapter 51, and subchapter III of chapter 53, title 5, United States Code, relating to classification and General Schedule pay rates. 110 Stat. at 4100. In 1997, however, Congress broadened the section 103(c)(7) exemption. *See* Department of the Interior and Related Agencies Appropriations Act, 1998, § 351, Pub. L. No. 105-83, 111 Stat. 1543, 1607 (1997). As amended, section 103(c)(7) now authorizes the Trust

[n]otwithstanding any other provision of law, . . . to appoint and fix the compensation and duties and terminate the services of an executive director and such other officers and employees as it deems necessary without regard to the provisions of title 5, United States Code, or other laws related to the appointment, compensation or termination of Federal employees.

16 U.S.C. § 460bb note. This amendment was adopted without debate by unanimous consent. *See* 143 Cong. Rec. 19,444–48 (1997). And as both the Trust and the EEOC seem to agree, nothing in the legislative history gives any indication, one way or the other, as to what Congress intended to accomplish by this amendment. *See* Presidio Request, *supra* note 2, at 8 (acknowledging that "there is little legislative history regarding the amendment"); EEOC Response, *supra* note 2, at 4 (acknowledging that "[u]nfortunately, there is no legislative history to support or contradict either EEOC's or the Trust's interpretations"). We are thus left with the language of the amendment itself, which, we have explained, on its face encompasses sections 717 and 15.<sup>9</sup>

Although we believe that the foregoing discussion amply establishes that in enacting section 103(c)(7) Congress exempted the Trust from application of sections 717 and 15 to the extent that these statutes apply to the appointment,

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<sup>9</sup> The EEOC has suggested that an interpretation of "other laws" that includes section 717 of Title VII and section 15 of the ADEA would be so broad that it "would mean that the Trust would not have to make Social Security payments on its employees' behalf, and would not have to withhold federal income taxes from their paychecks." *See* E-mail for Leslie A. Simon, Office of Legal Counsel, from Thomas Schlageter, EEOC, *Re: Presidio Trust* (Mar. 1, 2004) ("EEOC E-mail"). The section 103(c)(7) exemption, however, only encompasses laws "related to the appointment, compensation or termination of Federal employees," and then only permits the Trust to "appoint and fix the compensation and duties and terminate the services" of Trust employees without regard to such laws. 16 U.S.C. § 460bb note. It is difficult to understand how Social Security payments and withholding taxes would fall within these categories.

compensation, duties or termination of Trust employees, two other considerations provide further confirmation of our conclusion. First, section 104(b) of the Presidio Trust Act exempts the Trust from “[f]ederal laws and regulations governing procurement by Federal agencies . . . with the exception of laws and regulations related to Federal government contracts governing working conditions and wage rates . . . and any civil rights provisions otherwise applicable thereto.” 16 U.S.C. § 460bb note. Congress easily could have carved employment discrimination laws out of its section 103(c)(7) exemption, just as it did with respect to civil rights provisions in section 104(b). That it did not do so suggests that the term “other laws” in section 103(c)(7) encompasses the federal employment discrimination laws as we have discussed.

Second, we are guided by the requirement that we “‘give effect, if possible, to every clause and word of a statute.’” *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (citation omitted). *See also Pa. Pub. Welfare Dep’t v. Davenport*, 495 U.S. 552, 562 (1990) (“Our cases express a deep reluctance to interpret a statutory provision as to render superfluous other provisions of the same enactment.”) (citation omitted). Were we to conclude that the “other laws” in section 103(c)(7) of the Trust Act did not include these federal employment discrimination laws insofar as they regulate the appointment, compensation, duties or termination of federal employees, it is unclear to us what the “other laws” referenced in section 103(c)(7) would include. Although we have identified a few provisions scattered throughout the U.S. Code relating to veterans’ employment rights, *see, e.g.*, 38 U.S.C. §§ 4214, 4314, 4324 (2000), and a criminal prohibition against a federal employee’s receiving salary supplementation from an outside source, *see* 18 U.S.C. § 209 (2000), these bear no more relationship to title 5 than do the federal employment discrimination laws discussed above.<sup>10</sup>

We hasten to note, however, that section 103(c)(7) does not exempt the Trust from *all* applications of sections 717 and 15. Section 103(c)(7)’s exemption allows

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<sup>10</sup> The EEOC points to two other possible examples of “other laws related to the appointment, compensation or termination of Federal employees”: 5 C.F.R. § 530.203(a) (2004) and 2 U.S.C. § 356 (2000). *See Newman v. Rosenblatt*, 2004 WL 602178, at \*2; EEOC E-mail, *supra* note 9. The Trust is exempt from these provisions, however, not by virtue of the “other laws” language, but rather by virtue of its exemption from title 5 itself. *See* 16 U.S.C. § 460bb note (“without regard to the provisions of title 5, United States Code”). For example, 5 C.F.R. § 530.203(a) sets forth circumstances in which “[n]o executive branch employee . . . may receive any allowance, differential, bonus, award, or other similar cash payment *under title 5, United States Code*” (emphasis added). This regulation, moreover, specifically implements section 5307 of title 5, which is substantively identical to the regulation. *See* 5 U.S.C. § 5307 (2000). The Trust, however, is explicitly exempt from title 5 and, as a result, is explicitly exempt from this title 5 restriction on its ability to pay its employees. The same is true of 2 U.S.C. § 356, which authorizes the Citizens’ Commission on Public Service and Compensation to “conduct . . . a review of the rates of pay of . . . offices and positions under the Executive Schedule in subchapter II of chapter 53 of Title 5” (emphasis added). It is unclear to us whether this Commission has authority other than to conduct a “review,” and therefore how it would affect the Trust’s ability to compensate its employees. But in any event, as with 5 C.F.R. § 530.203(a), this provision only applies to the extent that title 5 itself applies, from which, as we have explained, the Trust is explicitly exempt.

the Trust to “appoint and fix the compensation and duties and terminate the services” of its employees “without regard to the provisions of title 5, United States Code, or other laws related to the appointment, compensation or termination of Federal employees.” 16 U.S.C. § 460bb note. Many applications of the federal employment discrimination laws, however, do not regulate the appointment, compensation, duties or termination of federal employees. Title VII, for example, has been held to prohibit racially and sexually hostile work environments, *see Singletary v. District of Columbia*, 351 F.3d 519, 526 (D.C. Cir. 2003); *see also Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986), and racial and sexual harassment, *see, e.g., Bundy v. Jackson*, 641 F.2d 934, 943–44 (D.C. Cir. 1981). To the extent that these statutes cover employment actions other than the appointment, compensation, duties or termination of Trust employees, they remain applicable to the Trust notwithstanding section 103(c)(7).<sup>11</sup>

In sum, we conclude that in enacting section 103(c)(7) of the Trust’s organic statute, Congress exempted the Trust from section 717 of Title VII and section 15 of the ADEA to the extent that these statutes apply to the appointment, compensation, duties or termination of Trust employees, but not otherwise.

NOEL J. FRANCISCO  
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*Office of Legal Counsel*

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<sup>11</sup> We note that we do not here address the application to the Trust of Executive Orders prohibiting discrimination in federal employment, *see, e.g.,* Exec. Order No. 11478, §§ 1, 2, 34 Fed. Reg. 12,985 (1969); Exec. Order No. 11141, 29 Fed. Reg. 2477 (1964) (age), or whether a Trust employee could bring an employment discrimination suit against the Trust under the equal protection component of the Due Process Clause, *see Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *Davis v. Passman*, 442 U.S. 228, 247 (1979); *Brown v. GSA*, 425 U.S. 820 (1976).

## Application of 18 U.S.C. § 207(f) to a Former Senior Employee

Title 18, section 207(f) of the U.S. Code prohibits a former senior employee of an executive branch department from representing a foreign entity before members of Congress within one year of the termination of his employment.

June 22, 2004

### MEMORANDUM OPINION FOR THE ACTING DIRECTOR OFFICE OF GOVERNMENT ETHICS

You have requested our opinion whether 18 U.S.C. § 207(f) bars a former senior employee of an executive branch department\* from representing a foreign entity before members of Congress within one year of the termination of his employment.<sup>1</sup> For the reasons stated below, we conclude that the statute does prohibit such representation.

In the Ethics in Government Act of 1978, Congress substantially amended the conflict of interest laws applicable to federal employees in an attempt “to preserve and promote the integrity of public officials and institutions.” Pub. L. No. 95-521, 92 Stat. 1824. Among these conflict of interest laws are various restrictions on the activities of government officers and employees after they leave government service. These “post-employment” restrictions are set out in 18 U.S.C. § 207 (2000 & Supp. III 2004). Some post-employment restrictions apply solely to former executive branch personnel, *see, e.g.*, 18 U.S.C. § 207(a), (c), (d), while others apply to former members of Congress and officers and employees of the Legislative Branch, *see, e.g.*, 18 U.S.C. § 207(e). Subsection (f), added by the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, imposes certain restrictions relating to representation of foreign entities and applies to former officers and employees of both branches.

Section 207(f)(1) provides:

*Restrictions.*—Any person who is subject to the restrictions contained in subsection (c), (d), or (e) and who knowingly, within 1 year after leaving the position, office, or employment referred to in such subsection—

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\* Editor’s Note: We are not identifying in the published version of this opinion the executive branch department that employed the individual who is the subject of the opinion.

<sup>1</sup> *See* Letter for Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, from Marilyn L. Glynn, Acting Director, Office of Government Ethics (Apr. 6, 2004). We also solicited and obtained the views of the former employing department on this question. *See* Letter for Renée Lettow Lerner, Deputy Assistant Attorney General, Office of Legal Counsel (May 12, 2004). The Criminal Division of the Department of Justice concurs with the conclusion reached in this memorandum.

(A) represents a foreign entity before any officer or employee of any department or agency of the United States with the intent to influence a decision of such officer or employee in carrying out his or her official duties . . .

shall be punished as provided in section 216 of this title.

18 U.S.C. § 207(f)(1).<sup>2</sup> The question we must decide, therefore, is whether members of Congress are “officer[s] or employee[s] of any department or agency of the United States.”

In the absence of any context indicating otherwise, we would ordinarily construe the phrase “department or agency of the United States” to refer to entities within the Executive Branch. *See, e.g., Hubbard v. United States*, 514 U.S. 695, 699 (1995) (noting that the term “department” is commonly used “to refer to a component of the Executive Branch”). However, section 207(i) provides as follows:

*Definitions.*—For purposes of this section—

(1) the term “officer or employee”, when used to describe the person to whom a communication is made or before whom an appearance is made, with the intent to influence, shall include—

(A) in subsections (a), (c), and (d), the President and the Vice President; and

(B) in subsection (f), the President, the Vice President, *and Members of Congress*.

18 U.S.C. § 207(i) (emphasis added). Congress has thus expressly indicated its intent to bar individuals who have recently held senior government positions from lobbying its members on behalf of foreign entities. Unless the term “department or agency of the United States” is read to encompass the Legislative Branch, the inclusion of members of Congress in this provision would lack meaning or application. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is ‘a cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’”) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)); *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (“It is our

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<sup>2</sup> Section 216 provides both civil and criminal penalties for conduct violating section 207. 18 U.S.C. § 216 (2000).

duty ‘to give effect, if possible, to every clause and word of a statute.’”) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)).<sup>3</sup>

In addition, Congress has provided a statutory definition of the term “department,” applicable generally to title 18, that explicitly permits a broad interpretation that would extend to the Legislative Branch. “As used in this title: The term ‘department’ means one of the executive departments enumerated in section 1 of Title 5, *unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.*” 18 U.S.C. § 6 (2000) (emphasis added). Here, the inclusion of “Members of Congress” within the term “officer or employee of any department . . . of the United States” supports the conclusion that “department,” at least in the context of section 207(f), must include the Legislative Branch. In *Hubbard*, by contrast, the Supreme Court found “nothing in the text of [18 U.S.C. § 1001, prohibiting the making of false statements “in any matter within the jurisdiction of any department or agency of the United States”] . . . that even suggests . . . that the normal definition of ‘department’ was not intended.” 514 U.S. at 701 (overruling *United States v. Bramblett*, 348 U.S. 503 (1955), in which the Court had held that the term “department” in section 1001 included the Legislative Branch).

Our conclusion derives further support from the structure of section 207. The scope of section 207(f), limiting representation of foreign entities, is broader than that of certain other subsections respecting both those who may not lobby and those who may not be lobbied. The broader scope of section 207(f) suggests Congress had particular concern about representation of foreign entities. As noted above, section 207(f) applies to individuals subject to the restrictions in subsections (c), (d), and (e), and therefore covers former officers and employees of both the Executive and Legislative Branches. Section 207’s definitional provision likewise defines the prohibited “targets” of lobbying activity more broadly with respect to subsection (f) than it does with respect to subsections (a), (c), and (d), which apply only to former executive branch personnel. For purposes of subsections (a), (c), and (d), “the term ‘officer or employee,’ when used to describe the person to whom a communication is made or before whom an appearance is made, with the intent to influence,” includes “the President and the Vice President.” 18 U.S.C. § 207(i)(1). For purposes of subsection (f), as explained above, the term also includes “Members of Congress.” *Id.* § 207(i)(1)(B). There can be little doubt, therefore, that section 207(f) prohibits representation of foreign entities before Congress as well as before executive branch agencies.<sup>4</sup>

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<sup>3</sup> Limiting application of the phrase “Members of Congress” to members serving on commissions that constitute “agencies,” as your letter suggests, would not eliminate this problem but would rather merely render the phrase redundant.

<sup>4</sup> There is legislative history that could be read to suggest that Congress intended to proscribe representation of foreign entities only before the branch of government in which a particular individual formerly served. We do not find the legislative history persuasive on this point. Congress added the

Your letter suggests that the term “department” in section 207(f) should be interpreted in a manner consistent with the interpretation of that term in other parts of section 207 and other conflict of interest laws.<sup>5</sup> See, e.g., *Comm’r of Internal Revenue v. Keystone Consol. Indus.*, 508 U.S. 152, 159 (1993) (“It is a ‘normal rule of statutory construction’ . . . that ‘identical words used in different parts of the same act are intended to have the same meaning.’”) (citations and quotations omitted). But “the presumption is not rigid,” and yields to “the cardinal rule that ‘[s]tatutory language must be read in context.’” *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 596 (2004) (citations and quotations omitted) (finding that the term “age” in the Age Discrimination in Employment Act varies in meaning according to context). As discussed above, section 207(i) expressly differentiates between

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definitional sections 207(i)(1)(A) and (B), quoted in the text, in the Ethics Reform Act of 1989: Technical Amendments, Pub. L. No. 101-280, 104 Stat. 149 (1990). The explanation for the technical amendments states: “Definitions—The amendment specifies that the term ‘officer or employee’, when used to describe the person to whom a communication is made, includes the President and Vice President with respect to restrictions on former executive branch officials, and includes members of Congress with respect to restrictions on the Legislative Branch.” *Public Law No. 101-280, Ethics Reform Act of 1989: Technical Amendments, Detailed Explanation Prepared by House and Senate Legislative Counsel*, 1990 U.S.C.C.A.N. 169. This language in the explanation does not alter our analysis. The term “includes” in this sentence of the explanation is clearly not meant to be exclusive. Many other people besides those specifically listed in the explanation may not be contacted, see, e.g., 18 U.S.C. § 207(d)(2)(A). In the case of subsection (f), these people include employees of branches other than the one the restricted person formerly served in. We therefore do not read the explanation to suggest that Congress intended to proscribe representation of foreign entities only before the branch of government in which a restricted person formerly served. Even if it does, the text of the statute, which is controlling, provides no basis for drawing such a distinction. Both those who are restricted from lobbying and those who may not be lobbied are clearly specified for each subsection. Even if one construes the term “department” narrowly, section 207(f) would bar former legislative employees from lobbying executive branch agencies, and thus precludes a “same branch” interpretation. If the term “officer or employee” includes members of Congress for purposes of section 207(f), it must do so for all individuals covered by that section. Cf. *Hubbard*, 514 U.S. at 701 (18 U.S.C. § 6 requires courts to examine the text of a statute, not its legislative history); *id.* at 708 (“Courts should not rely on inconclusive statutory history as a basis for refusing to give effect to the plain language of an Act of Congress, particularly when the Legislature has specifically defined the controverted term.”).

<sup>5</sup> You cite, for example, two previous opinions of this Office interpreting other conflict of interest provisions. See *Conflicts of Interest—18 U.S.C. § 207—Former Executive Branch Officer*, 3 Op. O.L.C. 373 (1979); *Applicability of 18 U.S.C. § 205 to Union Organizing Activities of Department of Justice Employee*, 5 Op. O.L.C. 194 (1981). Neither of these opinions, however, provides guidance on the interpretation of the term “department” in section 207(f). In the 1979 opinion, we interpreted 18 U.S.C. § 207(a) not to bar legislative lobbying by a former Executive Branch official after concluding that legislation would not generally fall into the proscribed category of “particular matters involving specific parties.” 3 Op. O.L.C. at 376. In the 1981 opinion, we interpreted 18 U.S.C. § 205 (which prohibits certain representational activities by current employees before “any department, agency, [or] court”) as barring representation before the Office of the Architect of the Capitol, which we concluded fell within the “expansive” definition of “agency” in title 18. 5 Op. O.L.C. at 194–95. We acknowledged that the legislative history of the conflict of interest laws (which at that time did not include section 207(f)) suggested that Congress did not intend for section 205 to prohibit representational activities before Congress itself, but determined that “Congress did not intend to limit the term ‘agency’ to entities within the executive branch.” *Id.* at 195.

section 207(f) and other provisions of section 207, and thus provides a plain textual basis for giving “department” a broader meaning in section 207(f) than it might have in other conflict of interest provisions.<sup>6</sup>

We therefore conclude that 18 U.S.C. § 207(f) bars a former senior executive branch employee from representing a foreign entity before Congress within one year of leaving his position.

RENÉE LETTOW LERNER  
*Deputy Assistant Attorney General*  
*Office of Legal Counsel*

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<sup>6</sup> Nor do we believe that the “rule of lenity” requires a different conclusion. *Cf. Jones v. United States*, 529 U.S. 848, 858 (2000) (“We have instructed that ‘ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity’”) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). Resort to that rule is unnecessary in this instance, since we do not find the statute ambiguous. The rule of lenity applies only where, “after seizing everything from which aid can be derived, . . . we can make no more than a guess as to what Congress intended.” *Holloway v. United States*, 526 U.S. 1, 12 n.14 (1999) (internal quotations and citations omitted); *see also Muscarello v. United States*, 524 U.S. 125, 138–39 (1998) (“The simple existence of some statutory ambiguity . . . is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree.”); *Chapman v. United States*, 500 U.S. 453, 463 (1991) (“rule of lenity . . . is not applicable unless there is a ‘grievous ambiguity or uncertainty in the language and structure of the Act’”). The statute at issue here does not present any “grievous ambiguity” that cannot be resolved using ordinary tools of statutory construction.

# Authority to Prescribe Regulations Limiting the Partisan Political Activities of the Commissioned Officers Corps in the National Oceanic and Atmospheric Administration

The Department of Commerce may prescribe regulations limiting the partisan political activities of the Commissioned Officers Corps in the National Oceanic and Atmospheric Administration.

July 29, 2004

## MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL DEPARTMENT OF COMMERCE

You have asked for our opinion on whether the Department of Commerce may prescribe regulations limiting the partisan political activities of the Commissioned Officers Corps in the National Oceanic and Atmospheric Administration (“NOAA Corps”).<sup>1</sup> We conclude that 5 U.S.C. § 301 (2000) allows the Secretary to issue such regulations.

### I.

The federal Hatch Act limits the partisan political activities of most federal employees. 5 U.S.C. §§ 7321–7327 (2000). Employees covered by the Hatch Act must refrain, in most instances, from soliciting, accepting or receiving political contributions, *id.* § 7323(a)(2), running as a candidate for election to a partisan political office, *id.* § 7323(a)(3), or soliciting or discouraging the participation in any political activity of any persons who have an application for any compensation, grant, contract, ruling, license, permit or certificate pending before the employing office of such employee, *id.* § 7323(a)(4)(A). These restrictions apply only to an “employee” of the federal government, which 5 U.S.C. § 7322(1) defines as:

any individual, other than the President and the Vice President, employed or holding office in—(A) an Executive agency other than the General Accounting Office; (B) a position within the competitive service which is not in an Executive agency; or (C) the government of the District of Columbia, other than the Mayor or a member of the City Council or the Recorder of Deeds; *but does not include a member of the uniformed services.*

(Emphasis added.) The “uniformed services” include the Armed Forces, the Public Health Service and the NOAA Corps. 10 U.S.C. § 101(a)(5) (2000).

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<sup>1</sup> The NOAA Corps consists of approximately 285 commissioned officers who operate and manage NOAA’s fleet of scientific research ships and aircraft.

The Department of Defense (“DOD”) has issued regulations that restrict partisan political activities by officers of the Armed Forces on active duty. *See* Department of Defense Directive 1344.10 (June 15, 1990).<sup>2</sup> These restrictions are similar to those found in the federal Hatch Act. *See id.* ¶¶ 4.1.2, 4.2. The Department of Health and Human Services has likewise regulated the partisan political activities of those employed by the U.S. Public Health Service. 45 C.F.R. § 73.735-601(a) (2004) (“All employees in the Executive Branch of the Federal Government . . . are subject to basic political activity restrictions in subchapter III of Chapter 73 of title 5, United States Code (the former Hatch Act) and Civil Service Rule IV.”).<sup>3</sup> We understand that the Secretary of Commerce wishes to promulgate similar regulations for members of the NOAA Corps, and believes that 5 U.S.C. § 301 provides sufficient statutory authority for the proposed action. For the reasons that follow, we agree that 5 U.S.C. § 301 allows the Secretary of Commerce to issue the proposed regulations.

## II.

Section 301 provides, in pertinent part:

The head of an Executive department or military department may prescribe *regulations for the government of his department, the conduct of its employees*, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.

5 U.S.C. § 301 (emphasis added). The plain language of section 301 indicates that the proposed restrictions on the NOAA Corps officers’ political activities are within the Secretary’s authority so long as they are “regulations for . . . the conduct of [Department of Commerce] employees.”

Section 301, at the very least, allows the head of a department to establish regulations for the conduct undertaken by his employees in their capacity as federal employees; no other reading of the statute could be consonant with its text. *Cf. Davis Enters. v. EPA*, 877 F.2d 1181, 1188 (3d Cir. 1989) (noting that the appellants did not even attempt to challenge EPA’s authority under 5 U.S.C. § 301 to issue regulations “governing use of its employees’ time”). Such authority is

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<sup>2</sup> DOD’s statutory authority for these regulations is 10 U.S.C. § 973 (2000), which restricts the partisan political activities of officers of the Armed Forces on active duty and authorizes the Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard) to prescribe implementing regulations.

<sup>3</sup> The Department of Health and Human Services’ statutory authority for these regulations is 42 U.S.C. § 216(a) (2000), which provides that “[t]he President shall from time to time prescribe regulations with respect to the appointment, promotion, retirement, termination of commission, titles, pay, uniforms, allowances (including increased allowances for foreign service), and discipline of the commissioned corps of the Service.”

sufficient to enable some, but not all, of the proposed Hatch Act-like restrictions on NOAA Corps officers. For example, regulations prohibiting partisan political activity while on the job, or prohibiting threats to demote subordinates unless they vote a certain way, would easily qualify as “regulations for . . . the conduct of [Department of Commerce] employees” under section 301.

More difficult statutory questions arise with Hatch Act-like restrictions that seek to regulate the *off-the-job* behavior of NOAA Corps officers. These officers remain “employees” of the Department of Commerce even when off duty or otherwise away from the office and, for that reason, one might conclude that restrictions on the partisan political activities of such persons are still aimed at regulating “the conduct of . . . employees” for purposes of section 301, no matter when and where the conduct occurs. This view, however, gives a very broad scope to section 301’s grant of authority, and would allow a department head to regulate any “conduct” in which his employees engage, inside or outside of work, including conduct that has no nexus whatsoever to government employment.

It is not necessary to adopt such a broad construction of section 301 to find statutory authorization for the proposed regulations. We conclude that section 301 authorizes, at a minimum, the regulation of employees’ on-the-job conduct, as well as off-the-job conduct that may undermine the efficient operation of the Department or the effectiveness of employees in the performance of their duties. This construction generally accords with the views adopted by the Executive Branch and the federal courts in interpreting section 301. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 283, 309 (1979) (describing section 301 as a “housekeeping statute” and “simply a grant of authority to the agency to regulate its own affairs”).

Interpreting the phrase “conduct of [an] employee” categorically to exclude off-the-job conduct is not tenable. The need for a department head to manage effectively the department’s internal affairs requires that he or she be able to regulate the off-the-job conduct of employees that would undercut the sound management of the department or the ability of other employees to perform their jobs effectively. *See, e.g., United States v. Johnson*, 735 F.2d 373, 375 (9th Cir. 1984) (holding that 5 U.S.C. § 301 allows the Secretary of State “to impose restrictions on employees of his own department,” which includes restricting employees’ use of diplomatic passports outside of work). Furthermore, 5 U.S.C. § 7301 (2000) provides that “[t]he President may prescribe regulations for *the conduct of employees* in the executive branch.” (Emphasis added). The President has refused to construe “the conduct of employees” in section 7301 as limited to on-the-job conduct. To the contrary, Executive Order 12674, entitled “Principles of Ethical Conduct for Government Officers and Employees,” reaches a substantial amount of off-the-job conduct by executive branch employees. *See, e.g.,* Exec. Order No. 12674, § 101(j), 3 C.F.R. § 215 (1989) (“Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities.”); *id.* § 101(l) (“Employees shall satisfy in good faith their obligations as citizens, including all just

financial obligations, especially those—such as Federal, State, or local taxes—that are imposed by law.”); *id.* § 102 (“No employee who is appointed by the President to a full-time noncareer position in the executive branch, including all full-time employees in the White House Office and the Office of Policy Development, shall receive any earned income for any outside employment or activity performed during that Presidential appointment.”).

Like the cited provisions of Executive Order 12674, the proposed Hatch Act-like restrictions on partisan political behavior would be designed to reach off-the-job conduct in order to assist the Secretary in effectively managing the Department’s operations. Both Congress and the Supreme Court have repeatedly recognized that effective public service can depend on the need for government employees to refrain from partisan political activity, inside or outside of the workplace. *See Oklahoma v. Civil Serv. Comm’n*, 330 U.S. 127, 143 (1947) (“The end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship.”); *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 95 (1947) (“The influence of political activity by government employees, if evil in its effects on the service, the employees or people dealing with them, is hardly less so because that activity takes place after hours.”). To limit section 301’s scope of authority to the regulation of on-the-job employee conduct could disable a department head from effectively managing his or her employees.

### III.

We recognize that the Supreme Court has stated that section 301 authorizes “what the APA [Administrative Procedure Act] terms ‘rules of agency organization procedure or practice’ as opposed to ‘substantive rules.’” *Chrysler*, 441 U.S. at 310 (footnote omitted). *Chrysler* did not go so far as to hold that “rules of agency organization procedure or practice” are the *only* regulations that may be promulgated pursuant to section 301; it merely noted that such rules are one type of regulation authorized by section 301. *Id.* *But see* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules With the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 539 (2002) (“The [*Chrysler*] Court . . . analyz[ed] the language and history of § 301, concluding that it authorized *only* ‘rules of agency organization, procedure or practice,’ as opposed to legislative rules.”) (emphasis added). Nevertheless, several of the courts of appeals have relied on *Chrysler* to hold that section 301 may not be used as statutory authority for anything that would be deemed a “substantive rule” under the APA. *United States v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1255 (8th Cir. 1998) (“[T]he Supreme Court examined the Housekeeping Statute and held that it *does not* provide statutory authority for substantive regulations.”); *Schism v. United States*, 316 F.3d 1259,

1280 (Fed. Cir. 2002) (citation omitted) (“The Supreme Court . . . said § 301 . . . authorized no substantive rulemaking.”).<sup>4</sup> To avoid a court challenge to the proposed regulations, the Department should take care that any rules issued pursuant to section 301 not be the type of regulations that could be characterized as “substantive rules” under the APA.

The APA does not define the term “substantive rule,”<sup>5</sup> and the courts have recognized that the distinction between “substantive rules” and nonsubstantive rules (such as interpretative rules, general statements of policy and rules of agency organization procedure or practice) is difficult to draw. *See Chamber of Commerce of U.S. v. Dep’t of Labor*, 174 F.3d 206, 211 (D.C. Cir. 1999) (“This distinction is often difficult to apply, as even a purely procedural rule can affect the substantive outcome of an agency proceeding.”); *Air Transp. Ass’n of Am. v. Dep’t of Transportation*, 900 F.2d 369, 381 (D.C. Cir. 1990) (Silberman, J., dissenting) (“Lines between substance and procedure in various areas of the law are difficult to draw and therefore often perplex scholars and judges.”). The courts have stressed, however, that “substantive rules” are those with a direct effect on the rights and obligations of *private* parties governed by the agency. *See, e.g., Chamber of Commerce*, 174 F.3d at 211 (“A substantive rule . . . has a ‘substantial impact’ upon *private parties* and ‘puts a stamp of [agency] approval or disapproval on a given type of behavior.’”) (emphasis added; citations omitted); *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (“Substantive rules are ones which ‘grant rights, impose obligations, or produce other significant effects on *private interests*.’”) (emphasis added; citations omitted); *Air Transp. Ass’n*, 900 F.2d at 378 (“In using the terms ‘rules of agency organization, procedure, or practice,’ Congress intended to distinguish not between rules affecting different *classes of rights*—‘substantive’ and ‘procedural’—but rather to distinguish between rules affecting different *subject matters*—‘the rights or interests of regulated’ parties, and agencies’ ‘internal operations.’”) (internal citations omitted).

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<sup>4</sup> Our Office has likewise opined that an agency may not “issue substantive regulations solely on the authority of 5 U.S.C. § 301,” absent congressional ratification or approval in another statute. *See* Memorandum for the Files from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Executive Order Entitled “Safeguards Pertaining to Biomedical Research on Children”* (Jan. 23, 1989).

<sup>5</sup> Although the APA does not define the term, three separate provisions of the APA set forth procedures to be followed in the enactment of “substantive rules.” *See* 5 U.S.C. § 552(a)(1) (2000) (“Each agency shall separately state and currently publish in the Federal Register for the guidance of the public— . . . (D) *substantive rules* of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency.”) (emphasis added); 5 U.S.C. § 553(d) (2000) (“The required publication or service of a *substantive rule* shall be made not less than 30 days before its effective date, except—(1) a *substantive rule* which grants or recognizes an exemption or relieves a restriction . . .”) (emphasis added); 5 U.S.C. § 558(b) (2000) (“A sanction may not be imposed or a *substantive rule* or order issued except within jurisdiction delegated to the agency and as authorized by law.”) (emphasis added).

The proposed Hatch Act-like regulations, by contrast, would govern only the conduct of government employees, and would not directly affect the rights and obligations of private parties pursuant to the regulatory jurisdiction of the Department. The importance of this distinction between the regulation of government employees' conduct and the regulation of the citizenry at large has long been recognized by the Supreme Court—even when the former regulations affect public employees' off-the-job activities.<sup>6</sup> Similarly, the federal courts have recognized, in cases upholding public employers' anti-nepotism policies, that such restrictions on the off-duty conduct of government employees do not constitute a “substantial” or a “significant” impact on private behavior, as co-workers who wish to marry may still do so if one of them finds a new job.<sup>7</sup> In like manner, the proposed Hatch Act-like regulations would not produce “substantial” or “significant” effects on private parties or private interests—they would simply prevent agency employees from engaging in off-duty political activities which would undermine the efficiency and discipline of the agency's mission. For these reasons we conclude that the proposed rules would not be “substantive rules” under the APA.

#### IV.

The only remaining question is whether the proposed regulations are consonant with the First Amendment. The Supreme Court has upheld as constitutional the restrictions imposed by the federal Hatch Act. *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75 (1947). Assuming that the proposed regulations do not impose restrictions beyond those found in the federal Hatch Act, there should be no constitutional problem. The only possible distinction between this situation and *United Public Workers* is that the Secretary of Commerce, rather than Congress,

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<sup>6</sup> See, e.g., *Kelley v. Johnson*, 425 U.S. 238, 244–45 (1976) (noting that county's hair-grooming regulation for male members of its police force was not a regulation of “the citizenry at large,” but instead a regulation of the “employee[s] of the police department of Suffolk County” and finding this distinction “highly significant”); *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563, 568 (1968) (“[T]he state has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.”); see also *Shawgo v. Spradlin*, 701 F.2d 470, 483 (5th Cir. 1983) (upholding discharge of police officers for off-duty dating and cohabitation, and noting that “the State has ‘more interest in regulating the activities of its employees than the activities of the population at large’”) (citation omitted).

<sup>7</sup> See, e.g., *Parks v. City of Warner Robins*, 43 F.3d 609, 614 (11th Cir. 1995) (“We conclude that the [city's] anti-nepotism policy does not directly and substantially interfere with the right to marry. The policy does not create a direct legal obstacle that would prevent absolutely a class of people from marrying.”) (emphasis added); *Waters v. Gaston Cnty.*, 57 F.3d 422, 426 (4th Cir. 1995) (holding that county's anti-nepotism policy does not “directly and substantially” interfere with the right to marry because “the Policy does not forbid marriage altogether”); *Cutts v. Fowler*, 692 F.2d 138, 141 (D.C. Cir. 1982) (holding that FCC's anti-nepotism policy did not “significantly interfere with decisions to enter into the marital relationship” because “[t]he anti-nepotism policy . . . did not prohibit the Cutts's marriage; it only prevented the employment of Mrs. Cutts in a situation in which she would necessarily have been subject to the supervision of her husband”).

would be imposing the restrictions on public employees' political activities. But we can find nothing in the Supreme Court's jurisprudence to suggest that congressional ratification is a necessary condition to the constitutionality of the types of restrictions imposed by the Hatch Act. See *United Pub. Workers*, 330 U.S. at 103 ("Congress *and the administrative agencies* have authority over the discipline and efficiency of the public service.") (emphasis added); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (upholding "mini Hatch Acts" enacted by state legislatures).

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## Expenditure of Appropriated Funds for Informational Video News Releases

Informational video news releases produced by the Department of Health and Human Services regarding the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 do not constitute impermissible “covert propaganda” in violation of the Consolidated Appropriations Resolution, 2003, which forbids the expenditure of appropriated funds for “publicity or propaganda purposes.”

July 30, 2004

### MEMORANDUM OPINION FOR THE GENERAL COUNSEL DEPARTMENT OF HEALTH AND HUMAN SERVICES

On May 19, 2004, the General Accounting Office (“GAO”)<sup>1</sup> opined that certain informational video news releases produced by the Department of Health and Human Services regarding the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 constitute impermissible “covert propaganda” in violation of the Consolidated Appropriations Resolution, 2003, which forbids the expenditure of appropriated funds for “publicity or propaganda purposes.” You have asked for our views on the issue addressed in the GAO decision. We conclude, contrary to the GAO decision, that the expenditure of appropriated funds to produce and distribute the informational video news releases in question does not violate the prohibition on “propaganda.”\*

#### I.

The Department of Health and Human Services (“HHS”) and the Centers for Medicare and Medicaid Services (“CMS”), an agency within HHS, have produced three video news releases (“VNRs”) to inform potential beneficiaries about the prescription drug benefits recently added to the Medicare program by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (“MMA”), Pub. L. No. 108-173, 117 Stat. 2066. The Consolidated Appropriations Resolution, 2003 (“CAR”) provides that “[n]o part of any appropriation contained in this or any other Act shall be used for publicity or propaganda purposes within the United

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<sup>1</sup> On July 7, 2004, the General Accounting Office was renamed the Government Accountability Office. GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, 118 Stat. 811.

\* Editor’s Note: Congress subsequently enacted a statute that supersedes this opinion. *See* Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, tit. VI, § 6076, 119 Stat. 231, 301 (“Unless otherwise authorized by existing law, none of the funds provided in this Act or any other Act, may be used by an executive branch agency to produce any prepackaged news story intended for broadcast or distribution in the United States unless the story includes a clear notification within the text or audio of the prepackaged news story that the prepackaged news story was prepared or funded by that executive branch agency.”).

States not heretofore authorized by the Congress.” Pub. L. No. 108-7, tit. VI, § 626, 117 Stat. 11, 470.<sup>2</sup> GAO recently opined that portions of the VNRs produced by HHS and CMS—the “story packages”—constitute so-called “covert propaganda” proscribed by the “publicity or propaganda” rider because they do not identify “HHS or CMS as the source [of the VNRs] to the targeted television audience, and the content of the news reports was attributed to individuals purporting to be reporters, but actually hired by an HHS subcontractor.” *Department of Health and Human Services, Centers for Medicare & Medicaid Services—Video News Releases*, B-302710, at 16, 2004 WL 1114403, at \*11 (Comp. Gen. May 19, 2004) (“GAO VNR Decision”).

VNRs have become “the television version of the printed press release.” Letter for Gary Kepplinger, Deputy General Counsel, General Accounting Office, from Dennis G. Smith, Director, Centers for Medicare and Medicaid Services, Encl. 2 (Apr. 2, 2004) (“Smith Letter”) (internal citation omitted). VNRs ordinarily consist of several segments that may be used in whole or in part by television stations and networks in producing their news programs: (i) slates (paper or video summaries of the VNR); (ii) B-roll film (video clips without sound or narration); and (iii) story packages (completed news stories, often combining the B-roll film with the information on the slates). See GAO VNR Decision at 2–3, 5–6, 2004 WL 1114403 at \*2–\*3; Smith Letter, Encl. 1. Television stations, which receive VNRs via satellite feed or mail, may draw on those segments as they see fit, and “most news organizations using VNR[s] . . . often use only a portion or edited versions of the materials provided.” GAO VNR Decision at 4, 2004 WL 1114403, at \*2.<sup>3</sup> It is estimated that between 78 and 100 percent of all television stations incorporate VNRs into their newscasts. *Id.* at 3 n.2, 2004 WL 1114403 at \*2 n.2; Smith Letter, Encl. 1.

The use of VNRs has become widespread, in part because they provide “a more effective and targeted means to get news and information into the hands of broadcast professionals in an appropriate format” than do more traditional methods. Smith Letter, Encl. 1. They provide an especially convenient and cost-effective programming option for local news stations, many of which face budget constraints and may lack the resources to produce their own news report on a given topic. GAO VNR Decision at 4, 2004 WL 1114403, at \*2. Since the early 1990s, VNRs have been

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<sup>2</sup> Most appropriations statutes since 1951 have contained similar “publicity or propaganda” riders, which, as the language of this rider indicates, apply to all governmental entities receiving appropriated funds. See generally *Medicare Prescription Drug, Improvement, and Modernization Act of 2003—Use of Appropriated Funds for Flyer and Print and Television Advertisements*, B-302504, 2004 WL 523435 (Comp. Gen. Mar. 10, 2004) (“GAO March 2004 Decision”) (discussing history of “publicity or propaganda” riders). The identical appropriations rider appears in the Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, tit. VI, § 624, 118 Stat. 3, 356.

<sup>3</sup> Some journalistic codes of ethics call upon television stations to label and disclose the origin of all material provided by outsiders. GAO VNR Decision at 5 & nn. 17–19, 2004 WL 1114403, at \*3 & nn. 17–19.

regularly produced by “private corporations, nonprofit organizations and government entities.” *Id.* at 2, 2004 WL 1114403 at \*2. The use of VNRs by federal agencies subject to the “publicity or propaganda” appropriations riders appears to be the rule rather than the exception. From the Department of Agriculture to the Census Bureau to the Environmental Protection Agency, information is frequently made public through VNRs. *See* Website of Department of Agriculture, <http://www.usda.gov/agency/oc/vtr/vnrframe.htm> (last visited July 30, 2004) (providing over 100 VNRs produced by agency since 2001); Website of Census Bureau, <http://www.census.gov/pubinfo/www/video/promote.html> (last visited July 30, 2004) (providing “informative videos that reflect Census Bureau operations”); Website of Environmental Protection Agency, [http://www.epa.gov/epahome/headline\\_011802.htm](http://www.epa.gov/epahome/headline_011802.htm) (last visited July 30, 2004) (providing VNR regarding home radon screening that features interviews with the Secretary, doctors, contractors, and homeowners).<sup>4</sup>

Members of Congress—who are bound by the same “publicity or propaganda” prohibition in annual congressional appropriations riders<sup>5</sup>—also have relied upon VNRs. Representative Frost, for example, issued a VNR describing his participation in a Congressional Business Summit. *See* Website of Rep. Frost, <http://www.house.gov/frost/pr00/pr000508.htm> (last visited July 30, 2004). In addition, members of Congress routinely release “radio actualities,” which, like VNRs, address various issues and include interview clips. *See, e.g.,* Website of Sen. Stabenow, <http://stabenow.senate.gov/press/actualities.htm> (last visited July 30, 2004) (describing “radio actualities” as “group[s] of sound bites sent out to radio stations to be used in news reports” and providing eleven radio actualities); Website of Sen. Conrad, <http://conrad.senate.gov/press/press.html> (last visited July 30, 2004) (providing several “radio actualities,” including audio clips of the senator being interviewed by an unidentified interviewer).

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<sup>4</sup> *See also, e.g.,* Website of Consumer Product Safety Commission, <http://www.cpsc.gov/mpeg.html> (last visited July 30, 2004) (providing more than 140 VNRs regarding product safety recalls and related issues); Website of Transportation Security Administration, <http://www.tsa.gov/public/display?theme=8&content=0900051980058a7d> (last visited July 30, 2004) (providing VNRs on transportation security); Website of Food and Drug Administration, <http://www.foodsafety.gov/~fsg/vlibrary.html> (last visited July 30, 2004) (providing VNRs regarding issues related to food safety); Website of Selective Service System, [http://www.sss.gov/News\\_Conferences/press-5-22-01.htm](http://www.sss.gov/News_Conferences/press-5-22-01.htm) (last visited July 30, 2004) (providing VNR regarding increase in selective service registration after years of steady decline); Website of National Science Foundation, [http://www.nsf.gov/od/lpa/news/press/01/lasik\\_video.htm](http://www.nsf.gov/od/lpa/news/press/01/lasik_video.htm) (last visited July 30, 2004) (providing VNR about advances in Lasik eye surgery techniques resulting from agency-funded research programs); Website of Library of Congress, [http://www.loc.gov/loc/lcib/00089/bi\\_press.html](http://www.loc.gov/loc/lcib/00089/bi_press.html) (last visited July 30, 2004) (noting that “[a] special video news release on the Library’s April 24th celebration aired on more than 55 television stations across the nation”).

<sup>5</sup> In this fiscal year, for example, members of Congress received appropriated funds through the Legislative Branch Appropriations Act, 2004, Pub. L. No. 108-83, 117 Stat. 1007 (2003), and those funds are subject to the “publicity or propaganda” prohibition contained in the Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, tit. VI, § 624, 118 Stat. at 356 (“No part of any appropriation contained in this or any other Act shall be used for publicity or propaganda purposes within the United States not heretofore authorized by the Congress.”) (emphasis added).

These governmental VNRs have not been limited to slates and B-roll film—they have routinely included story packages that could be aired without further editing. The Agency for International Development, for example, issued a VNR story package in 2003 discussing its programs in Afghanistan that included the coda “this is Mary Lou Galyo reporting.” See Website of Agency for International Development, <http://www.usaid.gov/press/releases/2003/vnr030226.html> (last visited July 30, 2004). The Centers for Disease Control broadcast a VNR story package in 2000 regarding the dangers of smoking that included an interview with the Surgeon General, did not identify the agency as the source, and ended with “this is Sarah Vetter reporting.” See Website of Centers for Disease Control, [http://www.cdc.gov/tobacco/sgr\\_tobacco\\_use\\_trailer.htm](http://www.cdc.gov/tobacco/sgr_tobacco_use_trailer.htm) (last visited July 30, 2004). And HHS created two VNR story packages in 1999 setting forth the Clinton Administration’s position on prescription drug benefits and preventive health. See GAO VNR Decision at 8, 2004 WL 1114403, at \*5.<sup>6</sup>

The MMA, passed on December 8, 2003, makes several amendments to title XVIII of the Social Security Act, the Medicare federal health insurance program. See generally GAO March 2004 Decision at 3, 2004 WL 523435, at \*2. In the text of the Act, Congress specifically requires HHS and CMS to “broadly disseminate information” regarding the MMA’s prescription drug coverage, discount card program, and transitional assistance for low-income individuals. Pub. L. No. 108-173, § 101(a), 117 Stat. at 2075; see also GAO March 2004 Decision at 9, 2004 WL 523435, at \*7. The Conference Report reiterates that HHS and CMS are to “conduct a significant public information campaign to educate beneficiaries about the new Medicare drug benefit,” including a “concerted effort to . . . ensur[e] that the lower income seniors are aware of the additional benefits available to them.” H.R. Conf. Rep. No. 108-391, at 432–33 (2003).

The three VNRs (two in English; one in Spanish) at issue here have been produced by HHS and CMS in conjunction with Ketchum Public Relations and Home Front Communications to provide information about certain Medicare benefits under the MMA. See Smith Letter, Encl. 1. A cover page accompanying the VNRs—entitled “Government Answers Questions about New Medicare Law”—identifies key facts about the MMA and includes a description of the available video news feed. *Id.*, Encl. 2. Each VNR contains B-roll film of President Bush signing the MMA in the presence of members of Congress, a senior citizen at a

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<sup>6</sup> See also, e.g., Website of Federal Trade Commission, <http://www.ftc.gov/opa/2002/10/vnrma.htm> (last visited July 30, 2004) (providing VNR story package discussing agency efforts to improve cybersecurity in the private sector); Website of Census Bureau, <http://www.census.gov/pubinfo/www/multimedia/adoption.html> (last visited July 30, 2004) (providing VNR story package addressing adoption programs in Congress, including footage of Senators promoting those programs); Website of State Department, <http://www.state.gov/r/pa/obs/vid/30246.htm> (last visited July 30, 2004) (providing VNR story package addressing issues facing women abroad with narration and footage of the Secretary).

pharmacy, a pharmacist filling a prescription, senior citizens receiving blood pressure tests, and senior citizens enjoying various activities. See GAO VNR Decision at 6, 2004 WL 1114403, at \*3. The Spanish version contains video statements regarding the changes to Medicare under the MMA by Dr. Christina Beato of CMS; the English versions contain similar video statements by Tommy Thompson, Secretary of HHS, and Leslie Norwalk, Acting Deputy Administrator and Chief Operating Officer of CMS. *Id.* at 6–7, 2004 WL 1114403, at \*3–\*4.

Each of the VNRs also includes a story package with a lead-in script that may be read by a news anchor. *Id.* The story packages are narrated by Alberto Garcia (Spanish) and Karen Ryan (English), and each story package ends with the narrator stating: “In Washington, I’m Alberto Garcia [or Karen Ryan] reporting.” *Id.* at 7–8, 2004 WL 1114403, at \*4–\*5. Two of the story packages (one in English; one in Spanish) specifically address prescription drug benefits under the MMA and include statements such as “millions of people who are covered by Medicare [are] asking how [it] will help them” and “[the reporter] helps sort through the details.” *Id.* at 7, 2004 WL 1114403, at \*4. The interviews and narration of these story packages also indicate that the primary focus of the MMA is on the 2006 prescription drug benefit; that savings of up to twenty-five percent will be available with temporary discount cards in 2004; that preventive benefits will be offered; that low-income individuals may qualify for a \$600 credit on certain drug discount cards; and that no Medicare recipient will be forced to sign up for any of the new benefits. *Id.* The other story package (only in English) specifically addresses CMS’s advertising campaign and includes statements such as “the Federal Government is launching a new, nationwide campaign to educate 41 million people with Medicare about improvements to Medicare” and “the same Medicare you’ve always counted on plus more benefits . . . [is] the main message Medicare’s advertising campaign drives home about the new law.” *Id.* at 6, 2004 WL 1114403, at \*4. The narration of this story package also “indicat[es] that the campaign helps beneficiaries answer their questions about the new law, the administration is emphasizing that seniors can keep their Medicare the same, and the campaign is part of a larger effort to educate people with Medicare about the new law.” *Id.* at 6–7, 2004 WL 1114403, at \*4. “CMS [has] clearly identified itself as the source of these materials to the television stations receiving them,” and the last slate informs the receiving news stations to contact CMS for information about the VNRs. *Id.* at 6, 12, 2004 WL 1114403, at \*3, \*8.

In response to a request from GAO regarding the production, filming, and distribution of the VNRs, HHS and CMS stated:

[T]he VNR was not produced as a purported editorial, advocacy piece, or commentary. The purpose of this media effort was to convey factual information concerning changes to Medicare under the [MMA]. Karen Ryan, who narrates the English language VNR, does

not take any position whatsoever on the MMA. Instead, she merely reports what she specifically states are explanations of the new law by HHS and CMS officials. Secretary Thompson's and Acting Deputy Administrator Norwalk's statements about the MMA are directly attributed to them, in their official capacities. Ms. Ryan states further, and accurately, "Medicare officials emphasized that no one will be forced to sign up for any of the new benefits." She never states that this is her, or anyone else's, statement or view. Likewise, she adds, "The new law, say officials, simply offers people with Medicare ways to make their health care coverage more affordable." Again, it is made clear to the viewer that this is a statement from Medicare officials, rather than a party outside the agency. Similarly, in the Spanish language VNR, reporter Alberto Garcia interviews an identified Administration official about that official's statements regarding MMA. The narrator's statements are not editorials and do not advocate a position, and the officials' statements are not attributed to anyone outside Government.

Smith Letter, Encl. 1.

On May 19, 2004, GAO issued an opinion concluding that the VNR story packages violate the prohibition in the CAR on the use of appropriated funds for "publicity or propaganda" because they do not identify "HHS or CMS as the source to the targeted television audience, and the content of the news reports was attributed to individuals purporting to be reporters, but actually hired by an HHS subcontractor." GAO VNR Decision at 16, 2004 WL 1114403, at \*11. That decision marks the "first occasion" GAO has had to examine VNRs for consistency with the "publicity or propaganda" prohibition. *Id.* at 9, 2004 WL 1114403, at \*6. GAO noted that it had historically interpreted such riders to preclude funding for agency materials that were (i) self-aggrandizing, (ii) purely partisan in nature, or (iii) covert propaganda. *Id.* at 10, 2004 WL 1114403, at \*7. It determined that the VNRs only implicated the third prohibition. *Id.* In reviewing the VNRs for "covert propaganda," GAO refused to place any significance upon the fact "that the use of VNR materials, with already prepared story packages, is a common practice in the public relations industry and utilized . . . by government entities." *Id.* at 9-10, 2004 WL 1114403, at \*6. It also discounted Congress's statutory requirement that HHS and CMS "broadly disseminate information" regarding the MMA, concluding that "[w]hile CMS may have authority to use appropriated funds to disseminate information regarding the changes to Medicare pursuant to MMA, this authority is subject to the publicity or propaganda prohibition appearing in the annual appropriation act." *Id.* at 10, 2004 WL 1114403, at \*7.

GAO stated that, in its prior decisions, "findings of propaganda [we]re predicated upon the fact that the target audience could not ascertain the information

source.” GAO VNR Decision at 11, 2004 WL 1114403, at \*7. It cited a 1986 GAO decision in which “government-prepared editorials” supporting “President Reagan’s proposal to transfer the Small Business Administration [(“SBA”)] to the Department of Commerce” were deemed “covert propaganda” because they did not “disclos[e] to the readers of those editorials that SBA was the source of the information.” *Id.* (discussing Letter for Lowell Weicker, Jr., Chairman, Committee on Small Business, U.S. Senate, B-223098, B-223098.2, 1986 WL 64325 (Comp. Gen. Oct. 10, 1986) (“GAO SBA Decision”). It also cited a 1987 decision in which GAO determined that a program in which the State Department’s Office of Public Diplomacy for Latin America paid consultants “to write op-ed pieces in support of the Administration’s policy on Central America for distribution to newspapers” was “covert propaganda” because “[t]hese materials were ‘propaganda’ within the ‘common understanding’ of the term . . . designed to influence the media and public to support the Administration’s Latin American policies.” *Id.*, 2004 WL 1114403, at \*8 (discussing *To the Honorable Jack Brooks*, 66 Comp. Gen. 707 (Sept. 30, 1987) (“GAO State Department Decision”). In the GAO SBA Decision, the newspapers, but not the readers, were made aware of SBA’s involvement; in the GAO State Department Decision, neither the newspapers nor the readers were made aware of the State Department’s involvement.

Based upon its reading of those decisions, GAO determined that the VNR story packages—but not the slates or the B-roll film—constitute “covert propaganda.” GAO VNR Decision at 16, 2004 WL 1114403, at \*11. GAO separated out the slates and the B-roll film on the basis that they are intended for use by the television stations themselves, which are made aware of the role of HHS and CMS. *Id.* at 12, 2004 WL 1114403, at \*8. But because the story packages are intended for the television viewing audience, and because the story packages do not make the television audience aware of the role of HHS and CMS, GAO determined that the story packages constitute “covert propaganda.” *id.* “Importantly,” GAO explained, “CMS included no statement or other reference in either the story package or the anchor lead-in script to ensure that the viewing audience would be aware that CMS [wa]s the source of the purported news story.” *Id.* That failure to identify the source was dispositive, GAO concluded: “While we agree that the story packages may not be characterized as editorials, explicit advocacy is not necessary to find a violation of the prohibition.” *Id.* at 14, 2004 WL 1114403, at \*10. Although GAO stated in a footnote that “[o]n balance, the contents of the story packages consist of a favorable report on effects on Medicare beneficiaries, containing the same notable omissions and weaknesses as the [HHS and CMS] flyer and advertisements that we reviewed in our March 2004 opinion,” *id.* at 14 n.34, 2004 WL 1114403, at \*11-\*12 n.34, it made clear that “the content of the story packages themselves would not violate the publicity or propaganda prohibition if identifying the source to the target audience were not at issue,” *id.* at 14,

2004 WL 1114403, at \*10.<sup>7</sup> GAO therefore concluded that HHS and CMS have violated the “publicity or propaganda” prohibition in the CAR and, for that reason, also have violated the Anti-Deficiency Act, 31 U.S.C. § 1341 (2000), which prohibits making or authorizing an expenditure that exceeds available budget authority. GAO VNR Decision at 16, 2004 WL 1114403, at \*11.

You have asked us to review GAO’s VNR Decision and to provide our opinion on whether the expenditure of appropriated funds for production and distribution of the VNRs in question violates the “propaganda” prohibition in the CAR. For purposes of this memorandum, we take as a given that the VNRs produced by HHS and CMS are purely informational in content. As noted above, HHS and CMS maintained to GAO that the VNRs are “factual and accurate” and intended to “help TV stations and their audiences understand the basic provisions of the new Medicare law.” Smith Letter at 2. GAO also stated that it “agree[d] that the story packages may not be characterized as editorials” and that “the content of the story packages themselves would not violate the publicity or propaganda prohibition if identifying the source to the target audience were not at issue.” GAO VNR Decision at 14 & n.34, 2004 WL 1114403, at \*10 & n.34. The VNRs communicate information to the public about the new prescription drug benefits added by the MMA to the Medicare program administered by CMS. The VNRs are designed to assist in fulfilling Congress’s statutory mandate that HHS and CMS “broadly disseminate information” about the new Medicare benefits to the forty-one million potential beneficiaries. Pub. L. No. 108-173, § 101(c)(1), 117 Stat. at 2075. We understand that VNR story packages—as their widespread use by public and private entities attests—are highly effective at disseminating information: By providing video and audio in a pre-packaged and easily accessible format, VNR story packages significantly increase the likelihood that news programs will broadcast at least part of the provided information. CMS and HHS accordingly have chosen to use such story packages as part of their larger effort, pursuant to the requirements of the MMA, to inform the public of the significant changes

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<sup>7</sup> In the referenced March 2004 decision, GAO concluded that the content of certain HHS and CMS advertisements regarding the MMA did not constitute a “purely partisan message” for purposes of the “publicity or propaganda” prohibition:

The flyer and advertisements do not provide beneficiaries with comprehensive information about the benefits available as a result of MMA, or comparative details about those benefits. In addition, they do not address the impact of MMA on those eligible for both Medicaid and Medicare and those with Medicare supplemental policies. They do, however, identify the new benefits, note when they will become available, and . . . provide some information describing the new benefits. Notably, the materials refer beneficiaries to other sources for further information . . .

GAO March 2004 Decision at 10, 2004 WL 523435, at \*8. The “favorable” nature of the VNRs would seem to be a function of their exclusive focus on the new prescription drug benefits available to seniors; and any “notable omissions and weaknesses”—as GAO acknowledged, *see* GAO VNR Decision at 14 & n.34, 2004 WL 1114403, at \*10 & n.34—seem to be a product of the VNRs’ necessarily limited scope.

wrought to Medicare benefits by the MMA. Although it is true that facts can be presented in a biased or selective manner in order to advocate a particular view, the VNRs in question do not editorialize about proposed legislation or otherwise advocate a position on a question of public policy. HHS and CMS, through the VNRs, are simply reporting about the new Medicare benefits provided under the duly-enacted MMA. With that understanding, and for the reasons discussed below, we conclude that the expenditure by HHS and CMS of appropriated funds for the production and distribution of the VNRs does not violate the CAR’s prohibition on “propaganda.”

## II.

We have not heretofore “set out a detailed, independent analysis of ‘publicity or propaganda’ riders.” Memorandum for the Attorney General from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Anti-Lobbying Act Guidelines* at 3 (Apr. 14, 1995). However, based upon the analysis set forth below, including a review of the text and history of those riders, as well as GAO’s own earlier decisions interpreting them, we conclude, consistent with those earlier decisions, that the prohibition on “covert propaganda” applies to the advocacy of a particular viewpoint, not to the legitimate provision of information concerning the existing programs administered by the agency. We therefore determine—in light of the fact recognized by GAO that “the content of the story packages” at issue here is not editorial in nature, GAO VNR Decision at 14, 2004 WL 1114403, at \*10—that the VNRs do not constitute “covert propaganda.”

Although GAO is part of the Legislative Branch, *see Bowsher v. Synar*, 478 U.S. 714, 727–32 (1986), and we are therefore not bound by its legal opinions, *see General Services Administration Use of Government Funds for Advertising*, 25 Op. O.L.C. 91, 94 & n.5 (2001) (“*GSA Advertising*”), we have historically found GAO’s decisions in this area helpful, *see, e.g., Establishment of the President’s Council for International Youth Exchange*, 6 Op. O.L.C. 541, 547–48 (1982). GAO has interpreted the “publicity or propaganda” riders to prohibit three types of agency publications: those that are (i) self-aggrandizing, (ii) purely partisan in nature, or (iii) covert propaganda. GAO VNR Decision at 10, 2004 WL 1114403, at \*7.

The “self-aggrandizing” interpretation stems from GAO’s cardinal decision addressing the “publicity or propaganda” restrictions, which were first enacted in 1951. *See Appropriations—Limitations—Publicity and Propaganda Prohibition—Labor-Federal Security Appropriation Act, 1952*, 31 Comp. Gen. 311 (1952) (“GAO 1952 Decision”). GAO determined that the intent of the riders was “to prevent publicity of a nature tending to emphasize the importance of the agency or activity in question,” *id.* at 313, and it has since considered such gratuitous self-aggrandizement or puffery to be unauthorized “publicity,” GAO March 2004

Decision, *supra* note 2, at 7-8, 2004 WL 523435, at \*6. The “purely partisan in nature” interpretation, which may be traced to a 1960 GAO decision, posits that a publication may be so political in nature that it is not in furtherance of the purposes for which Government funds were appropriated. *See id.* at 8, 2004 WL 523435, at \*7 (discussing Letter for Joseph S. Clark, United States Senate, B-144323 (Comp. Gen. Nov. 4, 1960), available at <http://www.gao.gov/legal/index.html> (last visited June 3, 2013)). GAO thus considers publications that are “completely devoid of any connection with official functions” or “completely ‘political in nature’” to be barred as “propaganda” under the appropriations riders. *Id.* (quoting Letter for William L. Dawson, Chairman, Committee on Government Operations, House of Representatives, B-147578 (Comp. Gen. Nov. 8, 1962) (“GAO 1962 Letter”), available at <http://www.gao.gov/legal/index.html> (last visited June 3, 2013)). We have recognized the categories of “self-aggrandizing” and “purely partisan in nature” as reasonable and valid interpretations of the “publicity or propaganda” riders, *GSA Advertising* at 94–95 & n.6, and we agree with GAO that neither of those categories is implicated by the VNRs at issue here, *see* GAO VNR Decision at 10, 2004 WL 1114403, at \*7.<sup>8</sup>

That leaves the “covert propaganda” interpretation, which appears to stem from a 1978 decision in which GAO determined that a similarly worded appropriations rider—which prohibited the expenditure of funds on “publicity or propaganda . . . designed to support or defeat legislation pending before Congress”—prevented the Office of Consumer Affairs (“OCA”) from preparing “canned editorial materials” designed to make “public support for a particular point of view . . . appear greater than it actually is.” Letter for John M. Ashbrook, U.S. House of Representatives, B-129874, at 3, 9, 1978 WL 10700, \*3, \*7 (Comp. Gen. Sept. 11, 1978) (“GAO OCA Decision”). As noted above, GAO applied this interpretation in its 1986 SBA Decision and its 1987 State Department Decision. In the latter, addressing an appropriations prohibition materially identical to the one at issue here, GAO explained that publications that were “misleading as to their origin and reasonably constituted ‘propaganda’ within the common understanding of that term” were forbidden “covert propaganda.” GAO State Department Decision, 66 Comp. Gen. at 709. This Office has previously recognized the “covert propaganda” interpretation in terms similar to those articulated by GAO in its State Department Decision; we have stated that “covert attempts to *mold opinion* through the undisclosed use

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<sup>8</sup> The prohibition in the CAR refers, in the disjunctive, to “publicity” or “propaganda.” Pub. L. No. 108-7, § 626, 117 Stat. at 470. GAO has interpreted the term “publicity” to prohibit gratuitous “self-aggrandizement,” GAO 1952 Decision, 31 Comp. Gen. at 313 (riders “prevent *publicity* of a nature tending to emphasize the importance of the agency or activity in question”) (emphasis added), and the term “propaganda” to prohibit “purely partisan” activity, GAO March 2004 Decision at 8, 2004 WL 523435, at \*7 (riders prevent “general *propaganda* effort[s] designed to aid a political party or candidates”) (quoting GAO 1962 Letter) (emphasis added; internal quotation marks and citation omitted), as well as “covert propaganda.” Because only the “covert propaganda” interpretation is at issue here, we focus in this memorandum on the term “propaganda.”

of third parties” can constitute an illegal use of funds. *Legal Constraints on Lobbying Efforts in Support of Contra Aid and Ratification of the INF Treaty*, 12 Op. O.L.C. 30, 40 (1988) (emphasis added). In addressing the VNRs at issue here, we adhere to that understanding of the “covert propaganda” prohibition. We believe, however, that the articulation now adopted by GAO in its VNR Decision does not represent a reasonable application of that prohibition or a fair interpretation of the CAR.

In all previous instances in which GAO has found “covert propaganda,” the publications at issue were both (i) “misleading as to their origin” (i.e., “covert”) and (ii) “constituted ‘propaganda’ within the common understanding of that term.” GAO State Department Decision, 66 Comp. Gen. at 709; *see also* GAO SBA Decision at 9, 1986 WL 64325, at \*6 (publications deemed “misleading as to their origin and reasonably constitute[d] ‘propaganda’ within the common understanding of that term”); *cf.* GAO OCA Decision at 9, 1978 WL 10700, at \*7 (“canned editorial material and sample letter to the editor” were similar to “high-powered lobbying campaigns in which public support for a particular view is made to appear greater than it actually is”). In its VNR Decision, however, GAO dispensed with the “propaganda” requirement and focused solely on the “covert” nature of the communication. That interpretation, in our view, is improperly removed from the plain text of the CAR appropriations rider, which in relevant part proscribes “propaganda.”

“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (quoting *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)). The dictionary definition of “propaganda” is “[t]he systematic dissemination of doctrine, rumor, or selected information to promote or injure a particular doctrine, view, or cause.” *Black’s Law Dictionary* 1232 (7th ed. 1999) (emphasis added); *see also* 12 *Oxford English Dictionary* 632 (2d ed. 1989) (defining “propaganda” to mean “[t]he systematic propagation of information or ideas by an interested party, esp. in a tendentious way in order to encourage or instill a particular attitude or response”) (emphasis added); *Webster’s Third New International Dictionary* 1817 (2002) (defining “propaganda” to mean “dissemination of ideas, information, or rumor for the purpose of helping or injuring an institution, a cause, or a person” or “doctrines, ideas, arguments, facts, or allegations spread by deliberate effort through any medium of communication in order to further one’s cause or to damage an opposing cause”) (emphasis added). As commonly understood, to propagandize is not simply to provide information—it is to advocate, disseminate, and encourage a particular view, doctrine, or cause.

That was also evidently the understanding in 1951, when Congress first included restrictions on the use of funds for “publicity or propaganda” in appropriations

statutes. *See, e.g.*, Labor-Federal Security Appropriation Act, 1952, Pub. L. No. 82-134, 65 Stat. 209 (1951).<sup>9</sup> The contemporaneous dictionary definitions of “propaganda”—like the modern definitions noted above—indicated a systematic effort at indoctrination to a particular viewpoint, as opposed to a mere promulgation of information. *See, e.g.*, *Funk & Wagnalls New Standard Dictionary of the English Language* 1985 (1946) (defining “propaganda” as “[e]ffort directed systematically toward the *gaining of support for an opinion or course of action*” or “any institution or *systematic scheme for propagating a doctrine or system*”) (emphasis added); *Webster’s New International Dictionary* 1983 (2d ed. 1958) (defining “propaganda” as “[a]ny organized or concerted group, effort, or movement to *spread a particular doctrine or system of doctrines or principles*,” “dissemination of ideas, information, or gossip, or the like, *for the purpose of helping or injuring a person, an institution, a cause, etc.*,” or “a scheme or plan for the *propagation of a doctrine or a system of principles*”) (emphasis added). Consistent with those definitions, the legislative history of the original enactment of the “publicity or propaganda” prohibitions indicates that Congress intended to eradicate (i) agency efforts to direct and control public thinking on various issues of public debate, particularly through overt political action;<sup>10</sup> (ii) useless, excessive, or frivolous agency publications;<sup>11</sup> and (iii) agency self-promotion, aggran-

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<sup>9</sup> There was no legislative discussion regarding the “publicity or propaganda” prohibition in the CAR at issue here. Although Congress has routinely included restrictions on “publicity or propaganda” in appropriations acts for the past fifty years, the legislative record has been largely silent since their original enactment in 1951 and 1952. *See, e.g.*, GAO State Department Decision, 66 Comp. Gen. at 709 (“The legislative history of [the current version] is silent as to the intended effect of the restriction.”); GAO SBA Decision at 8, 1986 WL 64325, at \*6 (same); *cf.* GAO March 2004 Decision at 6, 2004 WL 523435, at \*5 (consulting the legislative history of the 1951 version to interpret the current version of the prohibition).

<sup>10</sup> *See, e.g.*, 97 Cong. Rec. 4099 (1951) (statement of Rep. Meader) (“It is wrong to have the executive branch of the Government spending the taxpayers’ funds to influence public thinking and to create policy.”); *id.* at 4741 (statement of Rep. Smith) (“I wonder why the Government is engaged in the business of directing public thinking. This amendment is merely an effort to stop that practice.”); *id.* at 4742 (statement of Rep. Vursell) (arguing that the amendment will “restrict propaganda, thought control, and unnecessary expense of publicity”); *id.* at 347–48 (statement of Sen. Watkins) (introducing into the record an article from *Forbes Magazine* and *Reader’s Digest* entitled “What Taxpayers Pay for Federal Thought Control,” which criticized the use of taxpayer funds by the Social Security Administration to promote “socialized medicine” and by the Department of Agriculture to organize a rally in favor of the Administration’s farm program); *id.* at 4099 (statement of Rep. Bow) (objecting to efforts by the Federal Security Agency to “organize local groups and then get those local groups to put the heat on the Congress” regarding “socialized medicine”); *id.* at 5474 (statement of Rep. Davis) (referring to the “disgraceful experience” of bringing county farm representatives to Minneapolis at taxpayer expense “to form a captive audience to let the Secretary of Agriculture expound his own personal strait-jacket political farm plan” in hopes that “those people would go to their respective home communities as disciples for that kind of a regimentation plan”).

<sup>11</sup> *See, e.g.*, 97 Cong. Rec. 5475 (statement of Rep. Meader) (describing federal pamphlets produced by taxpayer funds about vagrant cats, mist netting of Japanese birds, and eating fish for breakfast); *id.* at 6735 (statement of Sen. Byrd) (criticizing “useless[]” agency mailers such as “Raccoons of North and Middle America” and “Can Elephants and Water Buffalos Outwork Machinery?”).

dizement, or puffery.<sup>12</sup> The overarching concern was the use of federal funds to manipulate and control public opinion about policy issues: “[P]ublic opinion ought not . . . be subjected to influence and direction by the executive agencies, the administrative branch of the government, in the manner that it is today. . . . The people should not finance use of these agencies to foster and perpetuate the bureaucrats [*sic*] not the people’s objectives in national policy.” 97 Cong. Rec. 4099 (statement of Rep. Meader); *see also id.* at 6733–34 (statement of Sen. Byrd) (calling propaganda from the federal bureaucracy “one of the greatest abuses in our [time]” and suggesting that riders would “result in more news and less ‘bull’ from the Federal publicity mill”).

Just as clearly as Congress sought to stamp out government dissemination of political, frivolous, and self-aggrandizing publications, Congress sought to protect government dissemination of “legitimate informational work” or “facts about the work of the[] departments to the public.” 97 Cong. Rec. 6734, 6735 (statements of Sens. Aiken and Byrd). The chief objection to the appropriations riders was that they did not define the phrase “publicity or propaganda” with any precision, and thereby threatened public access to legitimate and necessary information.<sup>13</sup> Representative Yates questioned whether the amendments would “jeopardize publication by the Children’s Bureau of pamphlets pertaining to the training and growth of children,” *id.* at 4098; Senator Anderson objected to the amendments on the ground that they might block the production of a film “by the Atomic Energy Commission in order that school children may have an opportunity to become acquainted with some of the very important facts in connection with atomic activity,” *id.* at 6798. The sponsors—Representative Smith in the House and Senator Byrd in the Senate—responded that they intended to invoke the ordinary understanding of the term “propaganda,” which they believed was sufficiently limpid to distinguish true propaganda from legitimate information. Representative Smith explained, “It seems to me that we can well distinguish between what is propaganda and what is educational matter.” *Id.* at 4098. Senator Byrd “recog-

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<sup>12</sup> *See, e.g.*, 97 Cong. Rec. 6734 (statement of Sen. Byrd) (“Individual glorification of bureaucrats and political propaganda constitute the press service problem which this amendment seeks to curtail.”); 98 Cong. Rec. 2304 (1952) (statement of Rep. Meader) (complaining about the continued use of appropriated funds by federal agencies to engage in self-promotion, such as the dissemination of a “15-minute [radio] transcript that you can use to promote the philosophy and interests of the National Production Authority”).

<sup>13</sup> *See, e.g.*, 97 Cong. Rec. 4099–4100 (statement of Rep. Fogarty) (“We do not even know what the gentleman calls propaganda. We do not know what he calls the right type of publicity or the wrong type of publicity. That is the fault I find with this amendment. . . . [Y]ou do not define in the amendment what propaganda is or what publicity is.”); *id.* at 6798–99 (statement of Sen. Anderson) (arguing that Department of Agriculture information specialists are not propagandists and serve an important function of disseminating information to farmers); *id.* at 6798 (statement of Sen. Benton) (objecting on the grounds that the term “publicity” is loosely defined and the amendment did not distinguish between forbidden publicity and “the general activities of the Department [of Agriculture] in the field of education and instruction”).

nize[d] the need for disseminating information” and maintained that the amendments “would not in any way affect the legitimate efforts of agencies in disseminating information and answering requests from Members of Congress and the public generally.” *Id.* at 6796. In addition, informational programs otherwise authorized by statute did not fall within the scope of the amendments, which extended “only to matters which have not had the support or the approval of . . . Congress.” *Id.* at 4098 (statement of Rep. Phillips). The legislative history of the original appropriations riders thus suggests that Congress understood and embraced the distinction between true “propaganda” and legitimate “information” about government programs, and did not intend for the appropriations riders to restrict the latter.

Prior GAO and OLC opinions in this area further support this understanding. The “covert propaganda” interpretation may be traced, as noted above, to a 1978 GAO decision regarding efforts by the OCA to “engage in [a] political controversy as a *proponent* of proposed legislation that would establish a Consumer Protection Agency.” GAO OCA Decision at 6, 1978 WL 10700, at \*4 (emphasis added). GAO stated that “[i]n interpreting ‘publicity or propaganda’ provisions . . . this Office has consistently recognized that every Federal agency has a legitimate interest in communicating with the public and with the Congress regarding its policies and activities.” *Id.* at 3–4, 1978 WL 10700, at \*3.<sup>14</sup> GAO condemned, however, OCA’s preparation of “canned editorial materials and sample letters to the editor,” explaining that “canned and sample propaganda materials have been traditionally associated with *high-powered lobbying campaigns* in which public support for *a particular point of view* is made to appear greater than it actually is.” *Id.* at 9, 1978 WL 10700, at \*7 (emphasis added). Similar reasoning was articulated in GAO’s 1986 opinion regarding SBA efforts to “put[] forth the Administration’s *position* regarding the proposed reorganization of SBA.” GAO SBA Decision at 4, 1986 WL 64325, at \*3 (emphasis added). Although GAO reiterated its longstanding view that the appropriations riders “do not prohibit an agency’s legitimate informational activities,” it determined that SBA-prepared “editorials” on the proposed reorganization were improper because they were “misleading as to their origin *and* reasonably constitute[d] ‘propaganda’ within the common understanding of that term.” *Id.* at 9, 1986 WL 64325, at \*6 (emphasis added); *see also id.* (“[W]e conclude that the SBA ‘suggested editorials’ are beyond the range of acceptable agency public information activities[.]”). GAO adhered to that understanding in its 1987 opinion involving “articles, editorials, and op-ed pieces” produced by the State Department’s Office of Public Diplomacy for Latin America “*in support of the Administration’s position*” favoring the Contra forces in

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<sup>14</sup> Indeed, in its first opinion addressing the “publicity or propaganda” riders, GAO stated that “[i]t appears clear . . . that the prohibition . . . would not be for application to those functions . . . which deal with dissemination to the general public, or to particular inquirers, of information reasonably necessary to the proper administration of the laws.” GAO 1952 Decision, 31 Comp. Gen. at 314.

Nicaragua. GAO State Department Decision, 66 Comp. Gen. at 708 (emphasis added). GAO concluded that the State Department publications “were misleading as to their origin *and* reasonably constituted ‘propaganda’ within the common understanding of that term.” *Id.* at 709 (emphasis added). The essential factors in the prior GAO opinions were (i) that the agency’s role in the publication was not disclosed *and* (ii) that the content of the information published was “propaganda” as that term is ordinarily understood.

This Office, too, has previously noted that “[t]he role of the federal government in providing ‘information’ has traditionally been recognized as proper,” Memorandum for Robert J. Lipshutz, Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Statutory Restraints on Lobbying Activity By Federal Officials* at 7 (Nov. 29, 1977) (“*Lobbying Activity*”),<sup>15</sup> and has read the “covert propaganda” prohibition to target only “covert attempts to *mold opinion* through undisclosed use of third parties,” 12 Op. O.L.C. at 40 (emphasis added). That understanding—faithful to the language in the CAR—also comports with our recognition that the appropriations riders, if construed broadly, would bring a halt to a number of activities in which Executive officials have historically engaged, and would thus raise constitutional concerns. See Memorandum for John R. Bolton, Assistant Attorney General, Office of Legislative Affairs, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, *Re: Applicability of 18 U.S.C. 1913 to Contacts Between United States Attorneys and Members of Congress in Support of Pending Legislation* at 1 & n.3 (Oct. 27, 1987). We have accordingly determined that “the appropriation rider should be read as principally designed to meet the immediate evil perceived by Congress—the unchecked growth of a government public relations arm used to disseminate agency [views] to the public at large—not as an effort to interfere unduly with the normal and healthy functioning of the body politic.” *Lobbying Activity* at 6.<sup>16</sup>

We therefore do not agree with GAO that the “covert propaganda” prohibition applies simply because an agency’s role in producing and disseminating infor-

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<sup>15</sup> Although the *Lobbying Activity* memorandum addressed an appropriations rider that prohibited expenditures “for publicity or propaganda purposes designed to support or defeat legislation pending before Congress,” that similarly worded provision also has been interpreted by GAO to allow the dissemination of legitimate informational material. See *GAO OCA Decision* at 3–4, 1978 WL 10700, at \*3 (“In interpreting ‘publicity or propaganda’ provisions such as section 607(a), this Office has consistently recognized that every Federal agency has a legitimate interest in communicating with the public and with the Congress regarding its policies and activities.”).

<sup>16</sup> There is little judicial case law addressing the various “publicity or propaganda” appropriations riders, but what there is supports our textual reading. See *Dist. of Columbia Common Cause v. Dist. of Columbia*, 858 F.2d 1, 11 (D.C. Cir. 1988) (“Printing pamphlets, flyers, and posters in connection with an initiative campaign constitutes publicity or propaganda within the meaning of the appropriations statute.”) (emphasis added); *Nat’l Treas. Emps.’ Union v. Campbell*, 654 F.2d 784, 794 (D.C. Cir. 1981) (“The evident purpose of the anti-‘propaganda’ limitations is to curtail bureaucratic aggrandizement at the taxpayers’ expense.”) (emphasis added).

mation is undisclosed or “covert,” regardless of whether the content of the message is “propaganda.” GAO VNR Decision at 14, 2004 WL 1114403, at \*10.<sup>17</sup> Congress evidently intended for the appropriations riders to prevent agency advocacy of particular opinions or views; the term “propaganda” cannot fairly be read to encompass agency promulgation of legitimate governmental information about the programs administered by an agency and in furtherance of that agency’s statutory goals. We are sensitive to GAO’s concern about “agencies creating news reports unbeknownst to the receiving audience.” *Id.* at 13, 2004 WL 1114403, at \*9. But we believe a line must be drawn to distinguish legitimate governmental information from improper governmental advocacy.<sup>18</sup> The VNRs at issue here did not advocate a particular policy or position of HHS and CMS, but rather provided accurate (even if not comprehensive) information about the benefits provided under a recent Act of Congress: the MMA.<sup>19</sup> Informing the public of the facts about a federal program is not the type of evil with which Congress was concerned in enacting the “publicity or propaganda” riders.

Not only do members of Congress themselves use VNRs, as already noted, but Congress also has long been aware of the use of VNRs by federal agencies, which rely upon VNRs as highly effective and efficient tools for disseminating information. *See, e.g.*, S. Rep. No. 106-229, vol. II, at 517 (2000) (“[Food and Drug Administration] launched a public awareness campaign on the risk that unpasteurized or untreated juices may present to vulnerable populations, including the elderly. Educational materials including a press kit, consumer brochure, video news release, and a public service announcement were distributed to senior citizen groups, as well as day care centers, elementary schools, state PTA offices and media outlets. AARP and other organizations also assisted in distribution of the information.”); *id.* at 1320 (“The [United States Postal] Inspection Service will

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<sup>17</sup> The two statutory provisions GAO cited in support of its conclusion are inapposite. *See* GAO VNR Decision at 13, 2004 WL 1114403, at \*9 (citing 22 U.S.C. § 1461 and 47 U.S.C. § 396(g)(3)(A)&(B)). The first, 22 U.S.C. § 1461 (2000 & Supp. III 2004), prevents the Board of Broadcasting Governors from broadcasting pro-American news reports to domestic audiences. Such programs, however, would appear to constitute “propaganda” as commonly understood. The second, 47 U.S.C. § 396(g)(3)(A)&(B) (2000), prevents the Corporation for Public Broadcasting from producing or disseminating programs to the public. By its terms, however, that provision applies only to the Corporation for Public Broadcasting, which is not “an agency or establishment of the United States Government.” 47 U.S.C. § 396(b).

<sup>18</sup> We have no occasion to determine the threshold of “propaganda” necessary to violate the appropriations riders where agency involvement is undisclosed, and it might well be lower than where agency involvement is acknowledged. We do not believe, however, that the “covert propaganda” prohibition may be invoked without *any* finding of “propaganda.”

<sup>19</sup> Because we conclude that the VNRs do not constitute “covert propaganda,” we need not determine whether Congress’s instruction that HHS and CMS “broadly disseminate information” about the MMA, by itself, renders the CAR rider inapplicable. Pub. L. No. 108-7, § 626, 117 Stat. at 470 (banning publicity and propaganda “not heretofore authorized by the Congress”). We note that GAO, in its March 2004 Decision, stated that because of the “explicit authority” of HHS and CMS “to inform Medicare beneficiaries about changes to Medicare resulting from MMA,” the agencies’ “justification[s] for the materials [were] afforded considerable deference.” *Id.* at 2–3, 2004 WL 523435, at \*2.

issue three Video News Releases (VNRs) entitled, *Conning Older Americans; How They Scam Older Americans; and Fraud Fighters* which will be sent to local television stations via satellite for release during Consumer Protection Week. The VNRs correspond with the purpose of National Consumer Protection Week, which is to highlight consumer protection and education efforts around the country.”); S. Rep. No. 105-36, vol. II, at 436–37 (1997) (“‘How to Take the Scare Out of Auto Repair’ is the print component of a multi-media education campaign conducted by the [Federal Trade] Commission in conjunction with [National Association of Attorneys General] and the American Automobile Association . . . . This campaign also included the production and distribution of a video news release by satellite to television stations, and radio public service announcements to 425 radio stations nationwide.”).

Indeed, Congress has expressly approved the use of VNRs that, under GAO’s VNR Decision, might now be considered “covert propaganda.” In 1994, the Senate Committee on Appropriations supported the use of VNRs by the National Highway Traffic Safety Administration (“NHTSA”): “In fiscal year 1994, NHTSA used funding provided by the Committee for the development of video news release and radio public service announcements . . . informing the car-buying public as to how to purchase a new vehicle with attention to safety. . . . The Committee continues to be supportive of these efforts and believes that enhanced funding in fiscal year 1995 will better enable the agency to reach all segments of the car-buying public[.]” S. Rep. No. 103-310, at 136 (1994); *see also* 138 Cong. Rec. 1692 (1992) (statement of Rep. Slaughter) (introducing legislation that would “provide for the wide dissemination of . . . critical information [about diethylstilbestrol] by authorizing an appropriation . . . to fund such activities as the production and distribution of . . . video news releases”). Given the widespread and accepted use of informational VNRs, we cannot conclude—without clearer instruction from Congress—that informational government VNRs constitute “covert propaganda.”

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# Whether the Second Amendment Secures an Individual Right

The Second Amendment secures a right of individuals generally, not a right of states or a right restricted to persons serving in militias.

August 24, 2004

## MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

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The Second Amendment of the Constitution provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” You have asked for the opinion of this Office on one aspect of the right secured by this Amendment. Specifically, you have asked us to address the question whether the right secured by the Second Amendment belongs only to the states, only to persons serving in state-organized militia units like the National Guard, or to individuals generally. This memorandum memorializes and expands upon advice that this Office provided to you on this question in 2001.

As relevant to the question addressed herein, courts and commentators have relied on three different interpretations of the Second Amendment. Under the “individual right” view, the Second Amendment secures to individuals a personal right to keep and to bear arms, whether or not they are members of any militia or engaged in military service or training. According to this view, individuals may bring claims or raise challenges based on a violation of their rights under the Second Amendment just as they do to vindicate individual rights secured by other provisions of the Bill of Rights.<sup>1</sup> Under the “collective right” view, the Second Amendment is a federalism provision that provides to states a prerogative to establish and maintain armed and organized militia units akin to the National Guard, and only states may assert this prerogative.<sup>2</sup> Finally, there is a range of intermediate views according to which the Amendment secures a right only to select persons to keep and bear arms in connection with their service in an organized state militia such as the National Guard. Under one typical formulation, individuals may keep arms only if they are “members of a functioning, organized state militia” and the state has not provided the necessary arms, and they may bear arms only “while and as a part of actively participating in” that militia’s activities.<sup>3</sup> In essence, such a view would allow a private cause of action (or defense) to some persons to vindicate a state’s power to establish and maintain an armed and organized militia such as the National Guard.<sup>4</sup> We therefore label this group of intermediate positions the “quasi-collective right” view.

The Supreme Court has not decided among these three potential interpretations, and the federal circuits are split. The Executive Branch has taken different views over the years. Most recently, in a 2001 memorandum to U.S. Attorneys, you endorsed the view that the Second Amendment protects a “‘right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms’” but allows for “reasonable restrictions” designed “to prevent unfit persons from

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<sup>1</sup> See, e.g., *United States v. Emerson*, 270 F.3d 203, 220, 260 (5th Cir. 2001).

<sup>2</sup> See, e.g., *Silveira v. Lockyer*, 312 F.3d 1052, 1060–61, 1086–87 (9th Cir. 2002).

<sup>3</sup> *Emerson*, 270 F.3d at 219 (describing intermediate view); see also, e.g., *Cases v. United States*, 131 F.2d 916, 923 (1st Cir. 1942).

<sup>4</sup> See, e.g., *United States v. Parker*, 362 F.3d 1279, 1283 (10th Cir. 2004).

possessing firearms or to restrict possession of firearms particularly suited to criminal misuse.”<sup>5</sup>

As developed in the analysis below, we conclude that the Second Amendment secures a personal right of individuals, not a collective right that may only be invoked by a state or a quasi-collective right restricted to those persons who serve in organized militia units. Our conclusion is based on the Amendment’s text, as commonly understood at the time of its adoption and interpreted in light of other provisions of the Constitution and the Amendment’s historical antecedents. Our analysis is limited to determining whether the Amendment secures an individual, collective, or quasi-collective right. We do not consider the substance of that right, including its contours or the nature or type of governmental interests that would justify restrictions on its exercise, and nothing in this memorandum is intended to address or call into question the constitutionality, under the Second Amendment, of any particular limitations on owning, carrying, or using firearms.

This memorandum proceeds in four parts. Part I addresses the current unsettled state of the law in this area. Part II demonstrates that the text and structure of the Constitution support the individual right view of the Second Amendment. Part III shows why this view finds further support in the history that informed the understanding of the Second Amendment as it was written and ratified. Finally, Part IV examines the views of commentators and courts closest to the Second Amendment’s adoption, which reflect an individual right view, and then concludes by describing how the modern alternative views of the Second Amendment took hold in the early twentieth century.

## **I. The Unsettled Legal Landscape**

Recent interpretations of the Second Amendment have been characterized by disagreement and uncertainty. The Supreme Court has not decided the question that we address here, and at least three views prevail in the federal courts of appeals. The Executive Branch has taken varying positions, and the Amendment has been the subject of extensive academic debate for the past two decades.

The Supreme Court’s most important decision on the meaning of the Second Amendment, *United States v. Miller*,<sup>6</sup> grew out of the enactment of the National Firearms Act of 1934.<sup>7</sup> That Act was the first federal regulation of private

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<sup>5</sup> Memorandum for United States Attorneys from the Attorney General, *Re: United States v. Emerson* (Nov. 9, 2001) (quoting *Emerson*, 270 F.3d at 260), reprinted in Brief for the United States in Opposition, App., *Emerson v. United States*, 536 U.S. 907 (2002) (No. 01-8780) (denying certiorari). You added that the Department of Justice “can and will continue to defend vigorously the constitutionality, under the Second Amendment, of all existing federal firearms laws.”

<sup>6</sup> 307 U.S. 174 (1939).

<sup>7</sup> Ch. 757, 48 Stat. 1236.

firearms.<sup>8</sup> It taxed (and thereby registered) transfers of sawed-off shotguns or rifles capable of being concealed, machine guns, and silencers. It also taxed dealers in such weapons and required anyone who possessed such a weapon acquired before 1934 to register it with federal tax authorities.

A Second Amendment challenge to this Act produced *Miller* in 1939, the closest that the Supreme Court has come to interpreting the substance of the Amendment. Miller and a co-defendant were indicted for transporting an unregistered sawed-off shotgun in interstate commerce from Oklahoma to Arkansas, and the district court sustained their Second Amendment challenge to the indictment. On appeal by the government, neither defendant appeared or filed a brief.<sup>9</sup> The Court, in reversing and remanding, held that the sawed-off shotgun was not among the “Arms” protected by the Second Amendment absent “evidence tending to show that” its use or possession “at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia.” Citing an 1840 decision of the Tennessee Supreme Court, *Aymette v. State*, the Court concluded that it was not “within judicial notice” that a sawed-off shotgun was a weapon that was “any part of the ordinary military equipment” or whose use “could contribute to the common defence.” Absent evidence, therefore, the Court could not “say that the Second Amendment guarantees the right to keep and bear such an instrument.”<sup>10</sup>

After this one-paragraph discussion, the Court quoted the powers that Article I, Section 8, Clauses 15 and 16 of the Constitution grant to Congress to provide for calling forth, organizing, arming, and disciplining “the Militia,” and stated that the Second Amendment’s “declaration and guarantee” were made “[w]ith obvious purpose to assure the continuation and render possible the effectiveness of” the militia, and that the Amendment “must be interpreted and applied with that end in view.”<sup>11</sup> The Court then added a historical discussion demonstrating that “the term Militia” as used in various provisions of the Constitution, including the Second Amendment, referred to a body that “comprised all males physically capable of acting in concert for the common defense,” who “were expected to appear” for occasional training “bearing arms supplied by themselves and of the kind in common use at the time,” which in the 1700s usually meant a “good” musket of proper length.<sup>12</sup>

*Miller* did not resolve the question addressed in this memorandum. Although the meaning of the decision is much debated, three points appear evident. First, the

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<sup>8</sup> See *National Firearms Act: Hearings on H.R. 9066 Before the House Comm. on Ways and Means*, 73d Cong. 90 (1934) (statement of Ass’t Att’y Gen. Keenan); *United States v. Lopez*, 2 F.3d 1342, 1348 (5th Cir. 1993), *aff’d*, 514 U.S. 549 (1995).

<sup>9</sup> 307 U.S. at 175–77.

<sup>10</sup> *Id.* at 178 (citing *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 158 (1840)). We discuss *Aymette* below in Part IV.B.2.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 179; see *id.* at 179–82 (describing militia regulations, including arms requirements).

holding was limited to the meaning of “Arms” in the Second Amendment and whether a sawed-off shotgun is among the arms protected. In determining that meaning, the Court also interpreted the term “Militia” as used in the Constitution. Second, the Court did not categorically reject Miller’s Second Amendment challenge. The Court’s decision to address the substance of this challenge to his indictment, as opposed to concluding that only states could bring such a challenge, appears to be inconsistent with a collective right view.

Finally, the Court did not clearly decide between the individual right and quasi-collective right views. Its holding regarding the meaning of “Arms” is consistent with either view: The Court’s limitation of “Arms” to those weapons reasonably related to the preservation or efficiency of a well-regulated militia (such as those that are “part of the ordinary military equipment” or that “could contribute to the common defense”) could be consistent with a right to “keep and bear” such arms that is restricted to service in an organized military unit such as the National Guard; but that holding is also consistent with an individual right to keep and bear whatever “Arms” the Amendment protects. Similarly, the Court’s reference to the need to interpret the Second Amendment’s “declaration and guarantee” with the “end in view” of furthering “the continuation and render[ing] possible the effectiveness of” the militia could be consistent with a quasi-collective right view; but it is also consistent with the understanding of the relationship between an individual right to keep and bear arms and the “Militia” that prevailed at the time of the Founding, an understanding confirmed by early authorities’ discussions of the Second Amendment’s preface.<sup>13</sup>

Even so, absent from the Court’s opinion in *Miller* was any discussion of whether the defendants were members of the National Guard or any other organized military force, whether they were transporting the shotgun in the service of such a force, or whether they were “physically capable of” bearing arms in one and thus even eligible for service. The nature of the weapon at issue, not of the defendants or their activities, appeared to be the key fact, and this aspect of the opinion tends to point toward the individual right view rather than the quasi-collective right view. In addition, *Miller*’s broad reading of “Militia” is most consistent with the individual right view, as we explain below in Part II.C.2, and is in tension with the quasi-collective right view, under which the militia is understood to refer to select military units, akin to the modern National Guard, organized and armed by the states.<sup>14</sup>

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<sup>13</sup> See below Parts II.C (discussing Second Amendment’s preface), III.B–C (discussing Founders’ recognition that the individual right to arms furthered the citizen militia), IV.A (discussing early commentators), IV.B.2 (discussing early cases), IV.D (discussing views of Thomas Cooley soon after Civil War).

<sup>14</sup> Later opinions of the Supreme Court appear to accept the individual right view, at least in dicta, although none is dispositive. In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court rejected a claim that the Fifth Amendment’s criminal procedure protections applied to nonresident enemy aliens by pointing out, among other things, that a contrary view would require also applying the “companion

Three years after *Miller*, in *Cases v. United States*, the First Circuit read *Miller* to turn solely on the type of weapon at issue and to suggest an individual right view of the Second Amendment: “Apparently, then, under the Second Amendment [as interpreted in *Miller*], the federal government . . . cannot prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well regulated militia.” But the court doubted that *Miller* “was attempting to formulate a general rule applicable to all cases,” warned of the consequences of such a view, and asserted that it was “unlikely that the framers of the Amendment intended any such result.”<sup>15</sup> The court, instead, adopted what amounted to a quasi-collective right view: A person has no right under the Second Amendment unless he is “a member of a[] military organization” or uses his weapon “in preparation for a military career,” thus “contributing to the efficiency of the well regulated militia.”<sup>16</sup> Neither in support of its assertion about the Framers’ intent nor in its paragraph fashioning this rule did the court cite any text or other authority.

Also in 1942, the Third Circuit in *United States v. Tot* applied *Miller*’s definition of “Arms” to affirm the conviction of a defendant who received a pistol in interstate commerce after having been convicted of a felony involving violence.<sup>17</sup> Alternatively, the court rested its affirmance on the ground that the government may prohibit such a convict from possessing a firearm.<sup>18</sup> Although either of these

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civil-rights Amendments” in the Bill of Rights, including the Second Amendment. *Id.* at 784 (“during military occupation irreconcilable enemy elements, guerrilla fighters, and ‘werewolves’ could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against ‘unreasonable’ searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments”). In *Konigsberg v. State Bar of Cal.*, 366 U.S. 36 (1961), the Court, citing *Miller*, again equated the Second Amendment right with the rights secured by the First Amendment. *Id.* at 49 n.10. More recent cases have assumed an individual right in dicta by listing the Second Amendment right among the personal rights composing the “liberty” that the Constitution’s due process provisions protect. See *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992); *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion) (quoting *Poe v. Ullman*, 367 U.S. 497, 542–43 (1961) (Harlan, J., dissenting)); *id.* at 542 (White, J., dissenting) (same as plurality). But see *Adams v. Williams*, 407 U.S. 143, 150 (1972) (Douglas, J., dissenting) (“A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment,” but “[t]here is no reason why all pistols should not be barred to everyone except the police.”). The Court in *Lewis v. United States*, 445 U.S. 65 (1980), rejected an equal protection challenge to a prohibition against felons possessing firearms. In a one-sentence footnote explaining why it was applying rational basis review, the Court stated that such a prohibition is not “based upon constitutionally suspect criteria” and does not “trench upon any constitutionally protected liberties.” *Id.* at 65 n.8. Although this language is consistent with the view that the Second Amendment does not secure a right of individuals, it is also consistent with the traditional understanding of the individual right view that the liberty protected by the Second Amendment does not extend to convicted felons. See notes 19 & 29 below, and the discussions referenced therein.

<sup>15</sup> 131 F.2d 916, 922 (1st Cir. 1942).

<sup>16</sup> *Id.* at 923.

<sup>17</sup> 131 F.2d 261, 266 (3d Cir. 1942), *rev’d on other grounds*, 319 U.S. 463 (1943).

<sup>18</sup> *Id.* The same ground appears to have been available in *Cases*. See *id.*, 131 F.2d at 919 n.1.

views is consistent with an individual right,<sup>19</sup> *Tot* added, in apparent dicta, a one-paragraph historical discussion in support of the view that the Amendment “was not adopted with individual rights in mind, but as a protection for the states in the maintenance of their militia organizations against possible encroachments by the federal power.”<sup>20</sup> The court did not address the Amendment’s text but instead chiefly relied on the *Aymette* case’s account of the right that emerged from the English Revolution of 1688–1689.

Over the past few decades, the Executive Branch has taken differing views of the right secured by the Second Amendment.<sup>21</sup> In 1941, President Roosevelt signed legislation authorizing requisitions of private property for war use that prohibited requisitioning or new registration “of any firearms possessed by any individual for his personal protection or sport” and, moreover, any impairing or infringing of “the right of any individual to keep and bear arms.”<sup>22</sup> In 1959, this Office reviewed a bill that would have secured the custody and disposition of missiles, rockets, and earth satellites. We questioned its definition of “missile,” which included “projectile” and “seems to include conventional ammunition,” and we commented that if the bill purported “to prohibit *private individuals* from acquiring, possessing, or receiving any standard ammunition for firearms . . . serious constitutional problems would arise under the Second Amendment.”<sup>23</sup> In commenting on similar bills in 1961 and 1962, this Office cited and reaffirmed its 1959 memorandum.<sup>24</sup> In

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<sup>19</sup> Regarding violent felons, although the case involved possession, the court relied on authority for regulating the *bearing* of arms (banning carrying weapons concealed or to the terror of the people). For more on-point authority, see proposals made during the ratifying conventions, discussed below in Part III.C.1, and *Emerson*, 270 F.3d at 226 n.21; *cf. Lewis*, 445 U.S. at 65 n.8 (rejecting equal protection challenge to prohibition of felon possessing a firearm); *Richardson v. Ramirez*, 418 U.S. 24, 53–55 (1974) (holding constitutional the disenfranchisement of convicted felons who had completed their sentences and paroles).

<sup>20</sup> 131 F.2d at 266. The court cited some history from the Founding Era, which we address in Part III.C.1.

<sup>21</sup> We have not conducted a review of the government’s litigating positions in the numerous firearms cases since *Miller*. In its brief in *Miller*, the government made two alternative arguments. The first was consistent with a quasi-collective right view. See Brief for United States at 9–18, *United States v. Miller*, 307 U.S. 174 (1939) (No. 696). The second (which the Court adopted) was consistent with either a quasi-collective or individual right view. See *id.* at 18–20. Its present litigating position appears to be consistent with your 2001 memorandum to U.S. Attorneys endorsing the individual right view. See, e.g., *United States v. Lippman*, 369 F.3d 1039, 1045 (8th Cir. 2004) (Colloton, J., concurring in part and concurring in the judgment).

<sup>22</sup> Property Requisition Act, ch. 445, § 1, 55 Stat. 742, 742.

<sup>23</sup> Memorandum for Lawrence E. Walsh, Deputy Attorney General, from Paul A. Sweeney, Acting Assistant Attorney General, Office of Legal Counsel, *Re: H.R. 232, 86th Cong., 1st Sess., a bill “To provide for the securing of custody and disposition by the United States of missiles, rockets, earth satellites, and similar devices adaptable to military uses, and for other purposes”* at 1–2 (Apr. 9, 1959) (emphasis added).

<sup>24</sup> See Memorandum for Byron R. White, Deputy Attorney General, from Nicholas deB. Katzenbach, Assistant Attorney General, Office of Legal Counsel, *Re: H.R. 2057, a bill to provide for the securing of custody and disposition by the United States of missiles, rockets, earth satellites, and*

1965, however, the Justice Department expressly adopted the collective right interpretation in congressional testimony by Attorney General Katzenbach.<sup>25</sup>

Soon after, in 1968, Congress passed the first major federal gun regulation since 1938, the Omnibus Crime Control and Safe Streets Act.<sup>26</sup> This statute produced a flurry of decisions in the federal courts of appeals rejecting the individual right view. Following the Third Circuit's dicta in *Tot*, the Fourth, Sixth, Seventh, and Ninth Circuits eventually adopted the collective right view.<sup>27</sup> Following the First Circuit in *Cases*, the Eighth, Tenth, and Eleventh Circuits adopted quasi-collective right views.<sup>28</sup> As in *Tot* and *Cases*, many of these cases, particularly the initial ones, involved constitutional challenges by persons convicted of felonies or violent crimes,<sup>29</sup> and some involved challenges to restrictions

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*similar devices adaptable to military use* (May 8, 1961); Memorandum by Byron R. White, Deputy Attorney General, from Nicholas deB. Katzenbach, Assistant Attorney General, Office of Legal Counsel, *Re: Proposed report of the Department of Defense on H.R. 2057 "To provide for the securing of custody and disposition by the United States of missiles, rockets, earth satellites and similar devices adaptable to Military uses, and for other purposes"* at 1 (Mar. 22, 1962).

<sup>25</sup> See *Federal Firearms Act: Hearings Before the Subcomm. to Investigative Juvenile Delinquency of the Senate Comm. on the Judiciary*, 89th Cong. 40–41 (1965) (statement of Attorney General Katzenbach). For subsequent treatment of the Second Amendment, see, e.g., Memorandum for Richard G. Kleindienst, Deputy Attorney General, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Proposed "Federal Gun Registration and Licensing Act of 1969"* (Feb. 19, 1969) (in one-sentence discussion, citing *Miller* and *Tot* to find no "serious legal obstacle" under Amendment to proposal for federal registration of firearms and limited federal licensing); Memorandum for D. Lowell Jensen, Assistant Attorney General, Criminal Division, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Legislation Relating to Firearms and to Mandatory Sentencing*, at 2 (May 27, 1981) (citing *Miller* as basis for "perceiv[ing] no basis for suggesting that the [1968 Gun Control] Act so interferes with the powers of the States to raise militias as to transgress the Second Amendment"); Firearm Owners' Protection Act, Pub. L. No. 99-308, § 1(b)(1)(A), 100 Stat. 449, 449 (1986), *codified at* 18 U.S.C. § 921 note (2000) (law signed by President Reagan that recognized "the right[] of citizens . . . to keep and bear arms under the second amendment").

<sup>26</sup> Pub. L. No. 90-351, 82 Stat. 197.

<sup>27</sup> See, e.g., *Love v. Pepersack*, 47 F.3d 120, 122–24 (4th Cir. 1995); *United States v. Warin*, 530 F.2d 103, 105–07, 108 (6th Cir. 1976) (dismissing "the erroneous supposition that the Second Amendment is concerned with the rights of individuals rather than those of the States" and rejecting claim involving gun admittedly bearing reasonable relationship to preservation or efficiency of the army); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710–11 (7th Cir. 1999); *Hickman v. Block*, 81 F.3d 98, 99–102 (9th Cir. 1996). The Third Circuit's present position is at least the quasi-collective right view, if not the collective right view. See *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996).

<sup>28</sup> See, e.g., *United States v. Hale*, 978 F.2d 1016, 1019–20 (8th Cir. 1992); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977); *United States v. Wright*, 117 F.3d 1265, 1272–74 (11th Cir. 1997), *vacated in part on other grounds*, 133 F.3d 1412 (1998). These courts make clear that the right under the quasi-collective right view protects only members of organized militia units such as the National Guard, not members of the "militia" defined more broadly. *Oakes*, for example, rejected a claim based on the defendant's membership in the Kansas militia, which consisted of all able-bodied men between twenty-one and forty-five. 564 F.2d at 387; see also *Wright*, 117 F.3d at 1271–74 (similar); *Hale*, 978 F.2d at 1020 (similar); *Warin*, 530 F.2d at 105, 106, 108 (similar).

<sup>29</sup> See, e.g., *United States v. Baer*, 235 F.3d 561, 564 (10th Cir. 2000); *Gillespie*, 185 F.3d at 710–11; *Marchese v. California*, 545 F.2d 645, 646 (9th Cir. 1976); *United States v. Johnson*, 497 F.2d 548,

on carrying concealed weapons.<sup>30</sup> These decisions did not analyze, at least not in depth, the Amendment's text or history. Rather, they relied on *Tot* or *Cases* (or their progeny), claimed support from *Miller*, or both. As the Ninth Circuit recently recognized in the course of adhering to its collective right position, these earlier decisions reached their conclusions "with comparatively little analysis," "largely on the basis of the rather cursory discussion in *Miller*, and touched only briefly on the merits of the debate."<sup>31</sup>

In contrast, the burgeoning scholarly literature on the Second Amendment in the past two decades has explored the meaning of the Second Amendment in great detail. The collective right and quasi-collective right positions have many adherents,<sup>32</sup> although the preponderance of modern scholarship appears to support the individual right view.<sup>33</sup>

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550 (4th Cir. 1974) (per curiam); *Cody v. United States*, 460 F.2d 34, 35–37 (8th Cir. 1972); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971); *United States v. Synnes*, 438 F.2d 764, 766 (8th Cir. 1971), vacated on other grounds, 404 U.S. 1009 (1972). Courts have recognized that such holdings could be consistent with an individual right view. See *United States v. Price*, 328 F.3d 958, 961 (7th Cir. 2003); *supra* note 19 (discussing *Tot*); cf. *Emerson*, 270 F.3d at 261 (upholding prohibition on possession of firearm by person subject to domestic violence restraining order by concluding that Amendment protected an individual right but finding no violation); *Lippman*, 369 F.3d at 1044–45 (Colloton, J.) (similar).

<sup>30</sup> See *Hickman*, 81 F.3d at 99–103; *Thomas v. Members of City Council of Portland*, 730 F.2d 41, 42 (1st Cir. 1984) (per curiam). Courts have recognized that such holdings also could be consistent with an individual right view. See *Parker*, 362 F.3d at 1285–86 (Kelly, J., concurring) (arguing for upholding conviction on narrower ground that case involved reasonable restriction on concealed weapons, and criticizing circuit courts, in interpreting Second Amendment, for ignoring "the universal admonition to decide constitutional issues narrowly"); Part IV.B.2 (discussing cases recognizing individual right but rejecting right to carry concealed weapons).

<sup>31</sup> *Silveira*, 312 F.3d at 1063–64 & n.11.

<sup>32</sup> For a symposium of articles spanning the views, see *The Second Amendment Today: Historical and Contemporary Perspectives on the Constitutionality of Firearms Regulation*, 29 N. Ky. L. Rev. 643 (2002), and for articles critical of the individual right view, see *Symposium on the Second Amendment: Fresh Looks*, 76 Chi.-Kent L. Rev. 3 (2000). See also, e.g., Garry Wills, *A Necessary Evil: A History of American Distrust of Government* 207–21, 256–60 (1999); Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. Rev. 57 (1995); Richard M. Aborn, Essay, *The Battle Over the Brady Bill and the Future of Gun Control Advocacy*, 22 Fordham Urb. L.J. 417 (1995); Carl T. Bogus, Essay, *Race, Riots, and Guns*, 66 S. Cal. L. Rev. 1365 (1993); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 Val. U. L. Rev. 107 (1991); Wendy Brown, Comment, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment*, 99 Yale L.J. 661 (1989); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. Dayton L. Rev. 5 (1989); Samuel Fields, *Guns, Crime and the Negligent Gun Ownerin*, 10 N. Ky. L. Rev. 141 (1982); Warren Spannaus, *State Firearms Regulation and the Second Amendment*, 6 Hamline L. Rev. 383 (1983); cf. David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 Mich. L. Rev. 588 (2000); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 Yale L.J. 551, 554–55 (1991).

<sup>33</sup> See, e.g., 1 Laurence H. Tribe, *American Constitutional Law* 900 & 902 n.221 (3d ed. 2000); Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 Tex. Rev. L. & Pol. 157 (1999); Leonard W. Levy, *Origins of the Bill*

Recent decisions of the Fifth and Ninth Circuits have begun to remedy the relatively sparse judicial analysis of the meaning of the Second Amendment. In 2001, the Fifth Circuit in *United States v. Emerson* adopted the individual right view, based on an extensive analysis of the Amendment's text and history.<sup>34</sup> The following year, the Ninth Circuit in *Silveira v. Lockyer* rejected *Emerson* with an extended counter-analysis and reaffirmed its adherence to the collective right view.<sup>35</sup> Six members of the Ninth Circuit dissented from denial of rehearing en banc and endorsed an individual right view.<sup>36</sup>

In sum, the question of who possesses the right secured by the Second Amendment remains open and unsettled in the courts and among scholars. Accordingly, we turn to the Amendment's text, as commonly understood at the time of its adoption and interpreted in light of other provisions of the Constitution and the Amendment's historical antecedents, to discern its proper meaning.

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*of Rights* 134 (1999); Ronald S. Resnick, *Private Arms as the Palladium of Liberty: The Meaning of the Second Amendment*, 77 U. Det. Mercy L. Rev. 1 (1999); Brannon P. Denning, *Gun Shy: The Second Amendment as an "Underenforced Constitutional Norm,"* 21 Harv. J.L. & Pub. Pol'y 719 (1998); L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 Wm. & Mary L. Rev. 1311 (1997); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 Ga. L. Rev. 1 (1996); Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 Emory L.J. 1139 (1996); Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 Wm. & Mary L. Rev. 1737 (1995); David B. Kopel, *It Isn't About Duck Hunting: The British Origin of the Right to Arms*, 93 Mich. L. Rev. 1333, 1355 (1995); William Van Alstyne, Essay, *The Second Amendment and the Personal Right to Arms*, 43 Duke L.J. 1236; Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (1994); Clayton E. Cramer, *For the Defense of Themselves and the State: The Original Intent and Judicial Interpretation of the Right to Keep and Bear Arms* (1994); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1162–68 (1991); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309 (1991); Sanford Levinson, Comment, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 Ala. L. Rev. 103 (1987); David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 Harv. J.L. & Pub. Pol'y 559 (1986); Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 Law & Contemp. Probs. 143 (Winter 1986); Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* (1984); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204 (1983); see also Printz v. United States, 521 U.S. 898, 938 n.2 (1997) (Thomas., J., concurring) (noting "growing body of scholarly commentary indicat[ing] that the [right]" is a personal one); *Emerson*, 270 F.3d at 220 (similar).

<sup>34</sup> 270 F.3d at 227–60.

<sup>35</sup> 312 F.3d at 1060–87.

<sup>36</sup> *Silveira v. Lockyer*, 328 F.3d 567, 570 (9th Cir. 2003) (Kleinfeld, J., joined by Kozinski, O'Scannlain, and T.G. Nelson, JJ., dissenting from denial of rehearing en banc); see 328 F.3d at 568 (Pregerson, J., same); *id.* at 568 (Kozinski, J., same); *id.* at 592 (Gould, J., joined by Kozinski, J., same). For other recent opinions of Ninth Circuit judges endorsing the individual right view and criticizing *Silveira*, see *Nordyke*, 319 F.3d at 1195 (Gould, J., concurring); *Nordyke v. King*, 364 F.3d 1025, 1025 (9th Cir. 2004) (Kleinfeld, J., dissenting from denial of rehearing en banc); *id.* at 1026 (Gould, J., joined by O'Scannlain, Kleinfeld, Tallman, and Bea, JJ., same).

## **II. Textual and Structural Analysis**

The Second Amendment of the United States Constitution, part of the Bill of Rights, reads in full as follows:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

The Amendment expressly protects a “right of the people,” which is “to keep and bear Arms” and which has some relation to the prefatory declaration that a “well regulated Militia” is necessary for the ultimate end of “the security of a free State.” We address each of these phrases in turn and then consider how the structure of the Constitution illuminates the Amendment’s meaning.

As explained below, the text of the Second Amendment points to a personal right of individuals: A “right of the people” is ordinarily and most naturally a right of individuals, not of a state and not merely of those serving the state as militiamen. The phrase “keep arms” at the time of the Founding usually indicated the private ownership and retention of arms by individuals as individuals, not the stockpiling of arms by a government or its soldiers, and the phrase certainly had that meaning when used in connection with a “right of the people.” While the phrase “bear arms” often referred to carrying of arms in military service, it also sometimes denoted carrying arms for private purposes. The Amendment’s prefatory clause, considered under proper rules of interpretation, could not negate the individual right recognized in the clear language of the operative clause. In any event, the prefatory clause—particularly its reference to the “Militia,” which was understood at the Founding to encompass all able-bodied male citizens, who were required to be enrolled for service—is fully consistent with an individual right reading of the operative language. Moreover, the Second Amendment appears in the Bill of Rights amid amendments securing numerous individual rights, a placement that makes it likely that the right of the people to keep and bear arms likewise belongs to individuals. Finally, a consideration of the powers that the original Constitution grants or allows over the militia makes it unlikely that the Second Amendment would secure a collective or quasi-collective right.

### **A. “The Right of the People”**

The Second Amendment’s recognition of a “right” that belongs to “the people” indicates a right of individuals. The word “right,” standing by itself in the Constitution, is clear. Although in some contexts entities other than individuals are

said to have “rights,”<sup>37</sup> the Constitution itself does not use the word “right” in this manner. Setting aside the Second Amendment, not once does the Constitution confer a “right” on any governmental entity, state or federal. Nor does it confer any “right” restricted to persons in governmental service, such as members of an organized military unit. In addition to its various references to a “right of the people” discussed below, the Constitution in the Sixth Amendment secures “right[s]” to an accused person, and in the Seventh secures a person’s “right” to a jury trial in civil cases.<sup>38</sup> By contrast, governments, whether state or federal, have in the Constitution only “powers” or “authority.”<sup>39</sup> It would be a marked anomaly if “right” in the Second Amendment departed from such uniform usage throughout the Constitution.

In any event, any possible doubt vanishes when “right” is conjoined with “the people,” as it is in the Second Amendment. Such a right belongs to individuals: The “people” are not a “State,” nor are they identical with the “Militia.” Indeed, the Second Amendment distinctly uses all three of these terms, yet it secures a “right” only to the “people.” The phrase “the right of the people” appears two other times in the Bill of Rights, and both times refers to a personal right, which belongs to individuals. The First Amendment secures “the right of the people peaceably to assemble, and to petition the Government for a redress of grievances,” and the Fourth safeguards “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” In addition, the Ninth Amendment refers to “rights . . . retained by the people.” We see no reason to read the phrase in the Second Amendment to mean something other than what it plainly means in these neighboring and contemporaneous amendments.

The Supreme Court, in interpreting the Fourth Amendment, likewise has recognized that the Constitution uses “the people,” and especially “the right of the people,” to refer to individuals:

“[T]he people” seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by “the People of the United States.” The Second Amendment protects “the right of the people to keep and bear Arms,” and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to “the people.” *See also* U.S. Const., Amdt. 1 (“Congress shall make no law . . .

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<sup>37</sup> For example, Article II of the Articles of Confederation, drafted a decade before the Constitution, reserved to each state “every power, jurisdiction, and right” not expressly delegated to the federal government.

<sup>38</sup> In addition, the Copyright and Patent Clause authorizes Congress to grant an “exclusive Right” to authors and inventors for a limited time. U.S. Const. art. I, § 8, cl. 8.

<sup>39</sup> *See, e.g.*, U.S. Const. art. I, § 1; *id.* art. I, § 8; *id.* art. II, § 1; *id.* art. III, § 1; *id.* amend. X.

abridging . . . *the right of the people* peaceably to assemble”) (emphasis added); Art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year *by the People of the several States*”) (emphasis added). While this textual exegesis is by no means conclusive, it suggests that “the people” protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.<sup>40</sup>

Thomas Cooley, the leading constitutional scholar after the Civil War, took the same view in explaining “the people” in the context of the First Amendment: “When the term ‘the people’ is made use of in constitutional law or discussions, it is often the case that those only are intended who have a share in the government through being clothed with the elective franchise. . . . But *in all the enumerations and guaranties of rights the whole people are intended*, because the rights of all are equal, and are meant to be equally protected.”<sup>41</sup>

The Constitution confirms this meaning of “the people” as individuals by expressly distinguishing the “people” from the “States,” using each word to refer to a distinct thing. Indeed, the Second Amendment itself refers separately to “the people” and the “State.” And the difference is firmly established by the Tenth Amendment, which distinguishes between the powers reserved “to the States” and those reserved “to the people.” The “people” are the individuals who compose the states, distinct from—and bearing their federal “rights” apart from—those entities.<sup>42</sup>

Similarly, the Constitution gives distinct meanings to “the people” and the “Militia.” Again, the Second Amendment itself is a notable example, referring to

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<sup>40</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990); see also *id.* at 279 (Stevens, J., concurring in judgment) (“aliens who are lawfully present in the United States are among those ‘people’ who are entitled to the protection of the Bill of Rights, including the Fourth Amendment”); *id.* at 287–88 (Brennan, J., dissenting) (similar; contending that “‘the people’” is broader than “‘citizens,’ ‘freemen,’ ‘residents,’ or ‘the American people’”). The Ninth Circuit in *Silveira* did not discuss the “right of the people” in the Second Amendment, and it disregarded *Verdugo-Urquidez* except to cite its analysis of “the people” as an analogy in support of its own reading of “Militia.” See 312 F.3d at 1069–70 & n.25, 1071 & n.27. While recognizing that “[t]he question . . . is not whether arms may be kept, but by whom and for what purpose,” *id.* at 1074, the court in *Silveira* did not consider that the “who[]” might be “the people” to whom the Second Amendment’s text—like that of the First, Fourth, and Ninth—expressly gives the right.

<sup>41</sup> Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 267–68 (1880; reprint 2000) (emphasis added).

<sup>42</sup> Of course the “people” might choose to exercise those individual rights in groups rather than alone, as in the First Amendment right to assemble and petition, but that does not make their rights “collective” or quasi-collective in the sense of depending on the will or actions of a state or on one’s service to it.

the “well regulated Militia” but granting the “right” to “the people.” The Constitution’s other references to “rights” of “the people,” noted above, cannot plausibly be construed as referring to the “Militia.” In addition, when granting governmental power over the militia, the Constitution speaks of the militia expressly, without any reference to or suggestion of the broader “people.”<sup>43</sup> And the Fifth Amendment’s Grand Jury Clause, which distinguishes between all “person[s]” and those serving in the army, navy, or “the Militia, when in actual service,” indicates that where the Constitution addresses rights that turn on service in the militia it does so expressly.

The only truly “collective” use of the “the people” at the time of the Founding was to refer to the people as they existed *apart from* government or any service to it. The Declaration of Independence refers to “one People” dissolving their political bonds with another and forming their own nation, and “We the people” created the Constitution in ratifying conventions chosen “by the People” of each state.<sup>44</sup> Thus, even in this context, the “people” are distinguished from “the government” or “the State”; nor can the term plausibly be limited to the “Militia.” And when “the people” appears in the phrase “the *right* of the people” in the Constitution, we conclude that it indicates a personal right of individuals, whether that be a right to assemble and petition, to be secure in one’s person and property, or to keep and bear arms.

## B. “To Keep and Bear Arms”

The “right of the people” that the Second Amendment secures is a right “to keep and bear Arms.” As the previous subpart showed, those who hold the right are, according to the text, “the people”—individuals—not the government or even the militia. The phrase “to keep and bear Arms” is consistent with this conclusion: The phrase “keep . . . Arms” reinforces it,<sup>45</sup> and the phrase “bear Arms” is not inconsistent with it.

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<sup>43</sup> U.S. Const. art. I, § 8, cls. 15–16; *id.* art. II, § 2, cl. 1.

<sup>44</sup> The last quotation is from the Constitutional Convention’s resolution transmitting the proposed Constitution to the Congress. 2 *The Records of the Federal Convention of 1787*, at 665 (Max Farrand ed., rev. ed. 1966). This distinction between the “people” and the government is why the Founders insisted that the Constitution be ratified by popularly elected special conventions rather than by the state governments, to ensure its supremacy over those governments. See *The Federalist No. 39*, at 253–54 (James Madison) (Jacob E. Cooke ed., 1961); James Madison, *Notes of Debates in the Federal Convention of 1787*, at 70 (1987) (remarks of Madison, June 5, 1787); *id.* at 348–49 (remarks of George Mason and Edmund Randolph, July 23, 1787); *id.* at 352–53 (remarks of Madison).

<sup>45</sup> Those who reject the individual right view tend to neglect “keep” or to treat it as redundant with “bear.” In *Silveira*, the court found it “not clear” why the word “was included in the amendment” and concluded by summarizing the Amendment as merely protecting a right to “‘bear arms’” in conjunction with militia service. 312 F.3d at 1074, 1086. See also Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 Chi.-Kent L. Rev. 291, 317 (2000) (contending without citation that “keep and bear” is “a unitary phrase,” with “keep” adding nothing to “bear,” but admitting possibility that “the plain meaning of ‘keep’ would have been sufficient to connote an individual right”); H. Richard Uviller & William G.

## 1. “To Keep . . . Arms”

In eighteenth-century English, an individual could “keep arms,” and keep them for private purposes, unrelated to militia duty, just as he could keep any other private property, and the phrase was commonly used in this sense. For example, in *Rex v. Gardner* (K.B. 1738), a defendant charged with “keeping a gun” in violation of a 1706 English statute (which prohibited commoners from keeping specified objects or “other engines” for the destruction of game) argued that “though there are many things for the bare keeping of which a man may be convicted; yet they are only such as can only be used for destruction of the game, whereas a gun is necessary for defence of a house, or for a farmer to shoot crows.” The court agreed, reasoning that “a gun differs from nets and dogs, which can only be kept for an ill purpose.”<sup>46</sup> The Court of Common Pleas six years later treated *Gardner* as having “settled and determined” that “a man may keep a gun for the defence of his house and family,”<sup>47</sup> and in 1752 the King’s Bench reiterated that “a gun may be kept for the defence of a man’s house, and for divers other lawful purposes.”<sup>48</sup> The same usage appeared in an earlier prosecution of a man for “keeping of a gun” contrary to a statute that barred all but the wealthy from privately owning small handguns.<sup>49</sup>

William Blackstone, whose *Commentaries on the Laws of England*, first published in the decade before the American Revolution, was the leading legal authority in America at the Founding, wrote, without any reference to the militia, of “person[s]” who are “qualified to keep a gun” and are “shooting at a mark,” apparently on their own property.<sup>50</sup> He also noted that certain persons could not

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Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 Chi.-Kent L. Rev. 403, 424–25, 508, 549–50, 593 (2000) (similar).

<sup>46</sup> 2 Strange Rep. 1098, 1098 (applying 5 Ann., c. 14 (1706)); see *Rex v. Gardner*, 87 Eng. Rep. 1240, 7 Mod. Rep. 279 (K.B. 1739) (apparently later case, but similar); *id.* at 1241 (defendant, arguing that “to charge only that he kept a gun is improper, for it includes every man that keeps a gun,” and that guns are kept “for the defence of a man’s house”); *id.* (Lee, C.J.) (words of statute “do not extend to prohibit a man from keeping a gun for his necessary defence”); *id.* (Probyn, J.) (“farmers are generally obliged to keep a gun, and are no more within the Act for doing so than they are for keeping a cabbage-net”).

<sup>47</sup> *Mallock v. Eastly*, 87 Eng. Rep. 1370, 1374, 7 Mod. Rep. 482 (C.P. 1744).

<sup>48</sup> *Wingfield v. Stratford*, 96 Eng. Rep. 787, 787, Sayer Rep. 15 (K.B. 1752).

<sup>49</sup> *King v. Silcot*, 87 Eng. Rep. 186, 186, 3 Mod. Rep. 280 (K.B. 1690) (italics omitted) (interpreting 33 Hen. VIII, c. 6 (1541), and quashing indictment because it did not specifically allege that defendant’s income was insufficient when he kept the gun).

<sup>50</sup> 4 William Blackstone, *Commentaries* \*182. The qualification to which Blackstone refers is a wealth requirement tied to the game laws, see *id.* at \*174–75, which we discuss in Part III.A and elsewhere. Regarding Blackstone’s influence and authority, see, e.g., Madison, *Notes of Debates*, *supra* note 44, at 547 (remarks of Dickenson, Aug. 29, 1787); *The Federalist No. 69*, at 465 n.\* (Alexander Hamilton); *The Federalist No. 84*, at 577 (Alexander Hamilton); Malcolm, *To Keep and Bear Arms*, *supra* note 33, at 130; *Schick v. United States*, 195 U.S. 65, 69 (1904). Edmund Burke informed Parliament that “they have sold nearly as many of Blackstone’s Commentaries in America as in

“keep arms in their houses,” pursuant to a statute that used “keep” to signify private ownership and control over arms, wherever located.<sup>51</sup> Colonial and early state statutes similarly used “keep” to “describe arms possession by individuals in all contexts,” including requiring those exempt from militia service (such as the over-aged) to “keep” arms in their homes for both law enforcement and “the defense of their homes from criminals or foreign enemies.”<sup>52</sup> At the Massachusetts Ratifying Convention in 1788, Samuel Adams proposed an amendment prohibiting Congress from “prevent[ing] the people of the United States, who are peaceable citizens, from keeping their own arms,” indicating ownership by individuals of private arms.<sup>53</sup> And that state’s Supreme Court, in a libel case soon after the Founding, likened the “right to keep fire arms” to the freedom of the press, both being individual but not unlimited rights—the former not protecting “him who uses them for annoyance or destruction.”<sup>54</sup> The basic dictionary definition of “keep”—“[t]o retain” and “[t]o have in custody”—was consistent with this specific meaning.<sup>55</sup>

In short, the phrase “keep arms” was commonly understood to denote ownership of arms by private citizens for private purposes. When that phrase is read together with its subject—“the right of the people”—the evidence points strongly toward an individual right. Had the Constitution meant not to protect the right of the whole “people” to “keep” arms but instead to establish a “right” of the states or of only the members of their militias to store them, presumably it would have used different language.<sup>56</sup>

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England.” Speech Concerning Resolutions for Conciliation With the Colonies (Mar. 22, 1775), in Edmund Burke, *Pre-Revolutionary Writings* 206, 225 (Ian Harris ed., 1993).

<sup>51</sup> 4 William Blackstone, *Commentaries* \*56; see *id.* (person barred from “keeping arms in his house”). See also 1 W. & M., 1st Sess., c. 15, § 3 (1688) (“no papist . . . shall or may have or keep in his house, or elsewhere, or in the possession of any other person to his use, or at his disposition, any arms, weapons, gunpowder, or ammunition”).

<sup>52</sup> Kates, *supra* note 33, 82 Mich. L. Rev. at 215, 219.

<sup>53</sup> We discuss this proposal below in Part III.C.1.

<sup>54</sup> *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304, 338 (1825).

<sup>55</sup> Samuel Johnson, *A Dictionary of the English Language* (1755) (unpaginated). See Noah Webster, *An American Dictionary of the English Language* (1828) (unpaginated) (defining “Keep” first as “To hold; to retain in one’s power or possession”).

<sup>56</sup> See Stephen P. Halbrook, *A Right to Bear Arms: State and Federal Bills of Rights and Constitutional Guarantees* 94 (1989) (contending that “common linguistic usage of the day . . . refer[ed] to the depositing of public arms in an arsenal, in contrast with the *keeping* of private arms by the people,” and providing an example of the former usage in a 1789 state statute); cf. U.S. Const. art. I, § 10, cl. 3 (“No State shall . . . keep Troops” without Congress’s consent) (emphasis added). When members of a militia, as opposed to the people in general, retained their own arms for militia service, common usage seems to have been to speak of them “providing” themselves with weapons, see Militia Act, ch. 33, § 1, 1 Stat. 271 (1792); Thomas Jefferson, *Notes on the State of Virginia* 88 (William Peden ed., 1955); 1 *The Papers of George Mason, 1725–1792*, at 212 (Robert A. Rutland ed., 1970), although we do not mean to claim that one could not speak of militiamen “keeping” arms for militia use.

## 2. “To . . . Bear Arms”

To “bear” was, at the Founding as now, a word with numerous definitions—used with great “latitude” and “in very different senses,” as Samuel Johnson noted in his dictionary.<sup>57</sup> Its basic meaning was simply to “carry” or “wear” something, particularly carrying or wearing in a way that would be known to others, such as in bearing a message, bearing another person, or bearing something as a mark of authority or distinction.<sup>58</sup> As a result, “bear,” when taking “arms” as its object, could refer to multiple contexts in which one might carry or wear arms in this way.<sup>59</sup> It is true that “bear arms” often did refer to carrying arms in military service.<sup>60</sup> But the phrase was not a term of art limited to this sense. Arms also could be “borne” for private, non-military purposes, principally tied to self-defense. For example, an early colonial statute in Massachusetts required every “freeman or other inhabitant” to provide arms for himself and anyone else in his household able to “beare armes,” and one in Virginia required “all men that are fitting to beare armes” to “bring their pieces” to church.<sup>61</sup>

There are also several examples closer to the Founding. In 1779, a committee of eminent Virginians including Thomas Jefferson and George Mason, charged with revising the new state’s laws, authored a bill penalizing any person who, within a year of having violated a restriction on hunting deer, “shall bear a gun out of his inclosed ground, unless whilst performing military duty.” This bill demonstrates that to “bear a gun” was not limited to “performing military duty.” James Madison submitted this bill to the Virginia legislature in 1785.<sup>62</sup> Many early state

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<sup>57</sup> Johnson, *Dictionary*, *supra* note 55 (unpaginated).

<sup>58</sup> See *id.* (defining “bear” as to “carry as a burden,” “convey or carry,” “carry as a mark of authority” (such as a sword), “carry as a mark of distinction” (such as to “bear arms in a coat”), and “carry as in show”); Webster, *American Dictionary*, *supra* note 55 (unpaginated) (defining “bear” as to “support,” “sustain,” “carry,” “convey,” “support and remove from place to place,” “wear,” and “bear as a mark of authority or distinction; as, to bear a sword, a badge, a name; to bear arms in a coat”).

<sup>59</sup> In *Muscarello v. United States*, 524 U.S. 125 (1998), which involved a statute, the Court was unanimous in understanding “bear arms” to refer generally to a person carrying arms upon his person for the purpose of being armed and ready for offensive or defensive action, the dissent citing the Second Amendment in support of this view. The majority gave “carries a firearm” a broader meaning. *Id.* at 130; *id.* at 139–40, 143 (Ginsburg, J., dissenting).

<sup>60</sup> See, e.g., Kates, *supra* note 33, 82 Mich. L. Rev. at 219 (explaining that, in early colonial statutes, “‘bear’ did generally refer to the carrying of arms by militiamen”); St. George Tucker, 2 *Blackstone’s Commentaries* \*408–09 n.1 (1803; reprint 1996) (“Tucker’s Blackstone”) (discussing Virginia law exempting from militia duty those “religiously scrupulous of bearing arms”); The Declaration of Independence para. 28 (1776) (“He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their country.”). Militia service was not, however, limited to “military” action. The Constitution speaks of using the militia “to execute the Laws of the Union,” which is distinct from both “repel[ling] Invasions” and “suppress[ing] Insurrections.” U.S. Const. art. I, § 8, cl. 15.

<sup>61</sup> Quoted in Malcolm, *To Keep and Bear Arms*, *supra* note 33, at 139.

<sup>62</sup> 2 *The Papers of Thomas Jefferson* 443–44 (Julian P. Boyd ed., 1950). Concerning the Committee of Revisors, see *id.* at 305; 1 Tucker’s Blackstone, *supra* note 60, Note F, at 444–45.

constitutions, including some written before the Founding (Pennsylvania's and Vermont's) and one written a month after Secretary of State Jefferson declared the Bill of Rights ratified (Kentucky's), protected an individual's right to "bear arms" in "defense of himself and the State" or in "defense of themselves and the State," indicating that a person might be said to "bear arms" in self-defense.<sup>63</sup> A 1780 opinion of London's Recorder (the city's legal adviser and the primary judge in its criminal court) on the legality of a *private* self-defense association acknowledged "the rights of the people of this realm to bear arms, and to instruct themselves in the use of them, collectively," albeit within limits.<sup>64</sup> In a newspaper commentary published in major cities after Madison introduced the Bill of Rights in Congress, a friend of his wrote that the proposed Second Amendment would "confirm[]" the people's "right to keep and bear their private arms."<sup>65</sup> Supreme Court Justice Joseph Story, in his 1833 *Commentaries on the Constitution of the United States*, paraphrased as a "right to bear arms" the right of English "subjects . . . [to] have arms for their defence," an individual right not tied to service in the militia.<sup>66</sup> Finally, other examples of contemporaneous uses of "bear arms" to denote actions of individuals appear in cases from the early 1800s up to the Civil War, discussed below in Part IV.B.

The Minority Report issued by twenty-one delegates of the Pennsylvania Convention that ratified the Federal Constitution in late 1787 illustrates the various uses of the phrase at the time, including both the *right* of private "bearing" and the *duty* of "bearing" for the government in the militia. The Report recommended amending the Constitution to recognize "[t]hat the people have a right to bear arms for the defence of themselves and their own State or the United States, or for the purpose of killing game" and also urged exemption from militia service for those "conscientiously scrupulous of bearing arms." Although the Minority Report was a product of Anti-Federalists, who had lost at that convention and who lost the

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<sup>63</sup> These are collected, through the Michigan Constitution of 1835, in *Emerson*, 270 F.3d at 230 n.29. We discuss the Pennsylvania and Vermont constitutions below in Part III.B.2. For an 1822 judicial interpretation confirming the plain meaning of the Kentucky provision as granting an individual right, see Part IV.B.1 below. Regarding ratification of the Bill of Rights, see Part III.C.2 below.

<sup>64</sup> Legality of the London Military Foot-Association (July 24, 1780), *reprinted in* William Blizard, *Desultory Reflections on Police: With an Essay on the Means of Preventing Crimes and Amending Criminals* 59, 59 (London 1785) (emphasis omitted). Regarding this opinion, which was "of wide interest," Leon Radzinowicz, 4 *A History of English Criminal Law* 107 (1968), *see id.* at 107–10; Malcolm, *To Keep and Bear Arms*, *supra* note 33, at 133–34; and our further discussion below in Part III.A. Regarding the Recorder, *see* 1 William Blackstone, *Commentaries* \*76; 3 *id.* at \*80–81 n.i; *id.* at \*334; John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View From the Ryder Sources*, 50 U. Chi. L. Rev. 1, 8, 17–19, 34–36 (1983).

<sup>65</sup> This essay by Tench Coxe is discussed below in Part III.C.2.

<sup>66</sup> Joseph Story, *Commentaries on the Constitution of the United States* § 980, at 695 (Ronald D. Rotunda & John E. Nowak eds., 1833, reprint 1987) ("Abridgement"). The English right is discussed below in Part III.A.

battle over ratifying the Constitution, we are unaware of any contemporaneous criticisms that this widely circulated document misused language in giving such senses to the phrase “bear arms.”<sup>67</sup>

In sum, although “bear arms” often referred to carrying or wearing arms in connection with military duty, it was not limited to such a meaning. When, as in the Second Amendment, those words are used in conjunction with “keep arms,” which commonly did refer to private action, and the whole phrase “to keep and bear Arms” is used in the context of a “right of the people,”<sup>68</sup> we conclude that the core, operative text of the Amendment secures a personal right, which belongs to individuals. We next consider whether the Amendment’s prefatory language requires a different conclusion.

### **C. “A Well Regulated Militia, Being Necessary to the Security of a Free State”**

A feature of the Second Amendment that distinguishes it from the other rights that the Bill of Rights secures is its prefatory subordinate clause, declaring: “A well regulated Militia, being necessary to the security of a free State, . . .” Advocates of the collective right and quasi-collective right interpretations rely on this declaration, particularly its reference to a well-regulated militia. On their interpretation, the “people” to which the Second Amendment refers is only the

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<sup>67</sup> See 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 665, 672 (1971). We discuss the Pennsylvania Convention, including the Minority Report and its critics, in Part III.C.1 below. Regarding the Report’s wide circulation, see *id.* at 628; 2 *The Documentary History of the Ratification of the Constitution* 617 (Merrill Jensen ed., 1976) (note); 15 *id.* at 7–10 (John P. Kaminski & Gaspare J. Saladino eds., 1984) (note).

<sup>68</sup> In addition, the Second Amendment’s reference to “Arms” in the context of “keep” and “bear” reinforces our view that it protects an individual right. The mere word “Arms” could denote any weapon, including artillery. See Webster, *American Dictionary*, *supra* note 55 (unpaginated) (defining “arms” as “Weapons of offense, or armor for defense and protection of the body” and including explanation of “Fire arms” as “such as may be charged with powder, as cannon, muskets, mortars &c.”; also defining the verb “arm” as including “[t]o furnish with means of defense; to prepare for resistance; to fortify”); Johnson, *Dictionary*, *supra* note 55 (unpaginated) (defining “arms” as “Weapons of offence, or armour of defence”). Certainly Congress’s power in Article I, Section 8, Clause 16 to provide for “arming” the militia includes such weapons, particularly given that the Constitution contemplates that the states will use militias to defend themselves against surprise invasions. See U.S. Const. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress, . . . keep Troops, . . . or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”); Militia Act § 4, 1 Stat. 271, 272 (1792) (requiring each division of state’s militia to have a company of artillery and troop of horse). If the Second Amendment protected a state prerogative to have organized and effective militias, one would expect it to protect all of the arms essential for that purpose, including artillery. Yet its text suggests that the “Arms” that it protects do not include those that “the people” could not both “keep” and “bear”—those that an individual could not store and carry. This use of “Arms” points toward an individual right view rather than a right of states to have select “militias,” and it also seems more consistent with an individual right than a quasi-collective right view, as the latter requires that the “militia” of which the claimant is a member be fully organized and equipped. See, e.g., *United States v. Parker*, 362 F.3d 1279, 1283 (10th Cir. 2004).

“people” in a collective, organized capacity as the state governments, or a small subset of the “people” actively organized by those governments into military bodies. “People” becomes interchangeable with the “State” or its “organized militia.”

This argument misunderstands the proper role of such prefatory declarations in interpreting the operative language of a provision. A preface can illuminate operative language but is ultimately subordinate to it and cannot restrict it.

Wholly apart from this interpretive principle, this argument also rests on an incomplete understanding of the preface’s language. Although the Amendment’s prefatory clause, standing alone, might suggest a collective or possibly quasi-collective right to a modern reader, when its words are read as they were understood at the Founding, the preface is fully consistent with the individual right that the Amendment’s operative language sets out. The “Militia” as understood at the Founding was not a select group such as the National Guard of today. It consisted of all able-bodied male citizens. The Second Amendment’s preface identifies as a justification for the individual right that a necessary condition for an effective citizen militia, and for the “free State” that it helps to secure, is a citizenry that is privately armed and able to use its private arms.

### **1. The Limits of Prefatory Language**

In the eighteenth century, the proper approach to interpreting a substantive or “operative” legal provision to which a lawmaker had joined a declaration (whether a “Whereas” clause or analogous language) was (1) to seek to interpret the operative provision on its own, and (2) then to look to the declaration only to clarify any ambiguity remaining in the operative provision.<sup>69</sup> It was desirable, if consistent with the operative text, to interpret the operative provision so that it generally fulfilled the justification that the preface declared, but a narrow declaration provided no warrant for restricting the operative text, and the preface could not itself create an ambiguity. This rule applied equally to declarations located in any part of a law, not simply at the beginning of it, and to both statutes and constitutions. We therefore consider this rule applicable to the Second Amendment.

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<sup>69</sup> This rule assumes that the legislature incorporated the declaration during the ordinary legislative process, not adopting it separately (with little consideration) or leaving it to others to insert. 2A Norman J. Singer, *Sutherland on Statutory Construction* § 47.04, at 220 & 223 (6th ed. 2000); see 1 James Kent, *Commentaries on American Law* 516 (9th ed. 1858) (noting that titles and preambles “generally . . . are loosely and carelessly inserted, and are not safe expositors of the law”); see also *King v. Williams*, 96 Eng. Rep. 51, 52, 1 Blackst. Rep. 93 (K.B. 1758) (“The conciseness of the title shall not control the body of the Act. The title is no part of the law; it does not pass with the same solemnity as the law itself. One reading is often sufficient for it.”); Thomas Jefferson, *A Manual of Parliamentary Practice for the Use of the Senate of the United States* 41 (1801; reprint 1993) (noting desirability that preamble “be consistent with” a bill but possibility that it may not be, because of legislative procedures).

English Parliaments of the 1700s and late 1600s regularly included prefaces throughout statutes—not only at the beginning (constituting the first section) but also in particular sections.<sup>70</sup> The same rule of interpretation applied to both uses of prefaces. As an example of the latter, a section of a bankruptcy statute recited the problem of persons who “convey *their* goods to other men upon good consideration” before becoming bankrupt, yet continue to act as owners of the goods; the immediately following clause of the statute provided that if a bankrupt debtor possessed “*any* goods or chattels” with “the consent and permission of the true owner,” was their reputed owner, and disposed of them as an owner, such property should repay the debtor’s debts rather than return to the true owner. The difficulty arose when the bankrupt debtor possessed property that never had been his, such as property in trust. A leading case in 1716 read the enacting language to apply even in such cases and rejected the argument “that the preamble shall restrain the operation of the enacting clause; and that, because the preamble is too narrow or defective, therefore the enacting clause, which has general words, shall be restrained from its full latitude, and from doing that good which the words would otherwise, and of themselves, import.”<sup>71</sup> The King’s Bench reiterated the rule in 1723, rejecting in a criminal case an argument based on declaratory language introducing part of a statute: “Now those general words in the enacting part, shall never be restrained by any words introducing that part; for it is no rule in the exposition of statutes to confine the general words of the enacting part to any particular words either introducing it, or to any such words even in the preamble itself.” The court acknowledged that “a construction which agrees with the preamble” was desirable, “but not such as may confine the enacting part to it.”<sup>72</sup>

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<sup>70</sup> Examples of both include the statutes discussed or cited below in Part III.A. *See, e.g.*, the Militia Act of 1662, 13 & 14 Car. II, c. 3, §§ 1, 3, 14, 20; the Game Act of 1671, 32 & 33 Car. II, c. 25, §§ 1, 2, 4, 5, 6, 7; the Act to Disarm Papists, 1 W. & M., 1st Sess., c. 15, §§ 1, 3 (1688); the Bill of Rights, 1 W. & M., 2d Sess., c. 2, §§ 1, 9 (1689); the Game Act of 1692, 4 & 5 W. & M., c. 23, §§ 1, 3, 4, 5, 7, 10; the act repealing the ban on hail-shot, 6 & 7 Will. III, c. 13, §§ 1, 3 (1695); and the Game Act of 1706, 5 Ann., c. 14, §§ 1, 3, 5.

<sup>71</sup> *Copeman v. Gallant*, 24 Eng. Rep. 404, 407, 1 P. Wms. Rep. 314 (Ch. 1716); *id.* at 405 (quoting statute) (emphases added); *see* 2A *Sutherland*, *supra* note 69, § 47.04, at 220 (“Copeman . . . established the rule that the preamble could not be used to restrict the effect of the words used in the purview.”). In *Ryall v. Rolle*, 26 Eng. Rep. 107, 1 Atkyns Rep. 165 (Ch. 1749), although the question was not at issue, *see id.* at 116 (Lee, C.J.); *id.* at 118 (Hardwicke, Ch.), some judges voiced disagreement with *Copeman*’s interpretation of that statute because of the great “inconvenience” it would cause to commercial arrangements such as trusts, agency, and bailment, but they still recognized the general rule, *see id.* at 113 (Parker, C.B.) (recognizing another case holding “[t]hat the preamble shall not restrain the enacting clause” and recognizing that *Copeman* “exploded the notion of the preamble’s governing the enacting clause,” but adding that “if the not restraining the generality of the enacting clause will be attended with an inconvenience, the preamble shall restrain it”); *id.* at 118 (Hardwicke, Ch.) (agreeing with Parker).

<sup>72</sup> *King v. Athos*, 8 Mod. Rep. 136, 144 (K.B. 1723). *See id.* (Fortescue, J.) (“[I]t must be admitted, that a preamble may be a good expositor of a statute; but what was offered on the other side is not properly a preamble, but only introductive to an enacting part of a statute: besides . . . preambles are no more than recitals of inconveniences, which do not exclude any other to which a remedy is given by the

Blackstone summed up this understanding in explaining that, although the words of an enacting clause were “generally to be understood in their usual and most known signification,” yet if its words, *after* due analysis, were “still dubious” or “ambiguous, equivocal, or intricate,” one might look to the context, which included “the proeme, or preamble, [which] is often called in to help the construction of an act of parliament.”<sup>73</sup> Chancellor Kent, a leading early American commentator, likewise reasoned that a preamble, although not technically part of the law, “may, at times, aid in the construction of” a statute or “be resorted to in order to ascertain the inducements to the making” of it, “but when the words of the enacting clause are clear and positive, recourse must not be had to the preamble.”<sup>74</sup>

Prefatory language also was common in constitutions, and this rule of construction applied in the same way. Speaking of the preamble of the whole federal Constitution, Joseph Story in his *Commentaries* reiterated that statutory preambles are “properly resorted to, where doubts or ambiguities arise upon the words of the enacting part; for if they are clear and unambiguous, there seems little room for interpretation,” and he could not see “any reason why, in a fundamental law or constitution of government,” the same rule should not apply.<sup>75</sup> Similarly, the Supreme Court has held that the Constitution’s preamble lacks any operative legal effect and that, even though it states the Constitution’s “general purposes,” it cannot be used to conjure a “spirit” of the document to confound clear operative language;<sup>76</sup> the Court has, however, also sought some guidance from the preamble when the operative text did not resolve a question.<sup>77</sup>

The same reasoning applied to declaratory phrases in the language of individual constitutional provisions, the closest analogies to the Second Amendment. The 1784 New Hampshire Constitution provided: “In criminal prosecutions, the trial of

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enacting part.”); *Kinaston v. Clark*, 26 Eng. Rep. 526, 527, 2 Atkyns Rep. 204 (Ch. 1741) (“There are many cases where the enacting part in a statute extends further than the preamble even in criminal matters . . .”).

<sup>73</sup> 1 William Blackstone, *Commentaries* \*59–60. See *Crespigny v. Wittenoom*, 100 Eng. Rep. 1304, 1305, 4 Term Rep. 791 (K.B. 1792) (Buller, J.) (“I agree that the preamble cannot controul the enacting part of a statute, which is expressed in clear and unambiguous terms. But if any doubt arise on the words of the enacting part, the preamble may be resorted to, to explain it.”); *id.* at 1306 (Grose, J.) (“Though the preamble cannot controul the enacting clause, we may compare it with the rest of the Act, in order to collect the intention of the Legislature.”).

<sup>74</sup> 1 Kent, *Commentaries*, *supra* note 69, at 516. See *Mills v. Wilkins*, 87 Eng. Rep. 822, 822–23, 6 Mod. Rep. 62 (Q.B. 1703) (“[T]he title is not the law, but the name or description given to it by the makers: just as the preamble of a statute is no part thereof, but contains generally the motives or inducements thereof.”); see also 2A *Sutherland*, *supra* note 69, § 47.04, at 221–22; *id.* at 224–25 (“The preamble can neither limit nor extend the meaning of a statute which is clear. Similarly, it cannot be used to create doubt or uncertainty.”).

<sup>75</sup> 1 Joseph Story, *Commentaries on the Constitution of the United States* §§ 459–460, at 443–44 (1833; reprint 1991).

<sup>76</sup> *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905).

<sup>77</sup> See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 821 n.31, 838 (1995); *id.* at 846 & n.1 (Thomas, J., dissenting); see also *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting).

facts in the vicinity where they happen, is so essential to the security of the life, liberty and estate of the citizen, that no crime or offence ought to be tried in any other county than that in which it is committed.”<sup>78</sup> Even though in some cases a trial outside of the county where a crime was committed might bring it closer to the crime scene, or a judge might think a trial in the county where the crime occurred not “essential to” (or even in conflict with) “the security of the life, liberty and estate of the citizen,” neither fact would justify disregarding the clear operative language of this constitutional provision.<sup>79</sup> Likewise, the pre-1787 constitutions of Massachusetts, New Hampshire, and Vermont declared that freedom of speech in the legislature was “so essential to the rights of the people” that words spoken there could not be the basis of “any” suit.<sup>80</sup> One could not use this declaration to avoid the clear immunity conferred by the operative language, even where particular statements made in the legislature—such as an egregious slander unrelated to a pending bill—were not thought “essential to” the people’s rights.<sup>81</sup> In addition, Madison’s draft of what became the First Amendment’s Free Press Clause read: “the freedom of the press, *as one of the great bulwarks of liberty*, shall be inviolable.”<sup>82</sup> The emphasized declaratory language presumably could not have qualified or limited the freedom clearly conferred, such as by exempting from protection, as hostile to “liberty,” publications advocating absolute monarchy.

A discussion at the Constitutional Convention demonstrates the same understanding, including that prefaces in a particular constitutional provision might merely state policy. What would become Article I, Section 8, Clause 16 of the Constitution, empowering Congress to “provide for organizing, arming, and disciplining the Militia,” had reached its final form. But George Mason proposed “to preface” it with the phrase, “And that the liberties of the people may be better secured against the danger of standing armies in time of peace.” He wished “to insert something pointing out and guarding against the danger of” standing armies. Madison spoke in favor, because the preface would “discountenance” a peacetime

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<sup>78</sup> N.H. Const. art. I, § 17 (1784), *reprinted in 4 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* 2455 (Francis Newton Thorpe ed., 1909; reprint 1993).

<sup>79</sup> See Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. 793, 798, 804–05, 808–09 (1998); Emerson, 270 F.3d at 234 n.32.

<sup>80</sup> Mass. Const. pt. I, art. 21 (1780), *reprinted in 3 Federal and State Constitutions*, *supra* note 78, at 1892; N.H. Const. art. I, § 30 (1784), *reprinted in 4 id.* at 2457; Vt. Const. ch. I, § 16 (1786), *reprinted in 6 id.* at 3753.

<sup>81</sup> See Volokh, *supra* note 79, 73 N.Y.U. L. Rev. at 794–95, 799–800. As with statutes, constitutional prefaces and operative language often do not match exactly, the latter sometimes being overinclusive compared to the declaration and sometimes underinclusive. See *id.* at 801–07 (providing examples).

<sup>82</sup> *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* 12 (Helen E. Veit et al. eds., 1991) (emphasis added).

standing army while “not restrain[ing] Congress from establishing” one.<sup>83</sup> No doubt an organized, armed, and disciplined militia *would* generally “better secure” liberties against peace-time standing armies (by reducing the need for such armies and the threat from any that were created), and thus the operative grant of power “agree[d] with” the declaratory preface;<sup>84</sup> but the preface did not restrain or confine the power.

We see no reason to except the Second Amendment from this broadly applicable interpretive rule.<sup>85</sup> Thus, the Amendment’s declaratory preface could not overcome the unambiguously individual “right of the people to keep and bear Arms” conferred by the operative text—even if the collective right and quasi-collective right schools’ understanding of the preface’s meaning were correct, and even though the preface might help resolve any ambiguities concerning the scope of that individual right remaining after one has analyzed the operative text. At the same time, any interpretation of the right ought, if possible consistent with its text, to further the declared justification in general, as the Court in *Miller* recognized when it stated that interpretation of the Amendment should keep the “end in view” of assuring the continuation and rendering possible the effectiveness of the militia.<sup>86</sup> As we explain in the remainder of this subpart—considering in turn the meaning of “Militia,” what a “well regulated Militia” was, and the ultimate end of “the security of a free State”—the individual right view does further the ends set forth in the prefatory language, and therefore the preface, properly understood, is fully consistent with the individual right interpretation of the operative text.

## 2. The “Militia”

A key claim of the collective right and quasi-collective right schools with regard to the Second Amendment’s preface is that a “well regulated Militia” is a standing military organization or body of troops, of limited size, organized and governed by state governments, albeit concurrently with the federal government (akin to voluntary select forces such as the National Guard that were established over a hundred years after the Amendment was adopted). As a result, the argument goes, the Amendment merely protects the states against federal efforts to undermine such forces, either by protecting the states directly or by protecting only persons serving in those forces.<sup>87</sup>

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<sup>83</sup> Madison, *Notes of Debates*, *supra* note 44, at 639 (Sept. 14, 1787). Mason’s proposal was defeated, apparently on the ground that it improperly impugned soldiers. *Id.* at 639–40.

<sup>84</sup> *Athos*, 8 Mod. Rep. at 144.

<sup>85</sup> The Ninth Circuit in *Silveira* provided only one paragraph on the proper relationship between a preface and operative language, concluding that the latter must be read “to implement the policy” of the former. *See* 312 F.3d at 1075.

<sup>86</sup> *United States v. Miller*, 307 U.S. 174, 178 (1939).

<sup>87</sup> *See, e.g., Silveira*, 312 F.3d at 1069–72.

This argument disregards the understanding of the “Militia” at the time of the Founding. As used in the Second Amendment, and elsewhere in the Constitution, “Militia” referred to a body consisting of all adult male citizens up to a certain age (anywhere from forty-five to sixty), the goal being to include all who were physically capable of service. It was not limited to a select force of persons in active military duty. This entire population of able-bodied male citizens was involuntarily “enrolled” by local militia officials, somewhat as men now register for the selective service (except that enrollment required no action by the citizen), and all enrolled citizens were required by law to join occasional “exercise”—to which they were expected to bring their own, private arms—but they otherwise remained in civilian life. The militia “rest[ed] upon the shoulders of the people,”<sup>88</sup> because, as then understood, it consisted of a large number of the “people” at any one time and of all of the able-bodied white men for a substantial portion of their lives. It was the people embodied as an armed force. Thus, a key aspect of the term “Militia” was the composition of the force to which it referred. As a result, the reference to the “Militia” in the Second Amendment’s preface “agrees with” the individual right that the Amendment’s operative text sets out,<sup>89</sup> because securing to “the people” a right to keep and to bear their own arms made such a broad-based, privately armed force more likely to exist and to be effective.<sup>90</sup>

The term “Militia” was used in contrast both to a regular, standing army and, more importantly, to a “select militia” or “corps.”<sup>91</sup> The latter distinction is evident throughout contemporaneous usage, “select militia” denoting a significantly smaller body, consisting either of better trained military professionals who could remain active for extended periods, or of those chosen selectively, perhaps because of political or other discrimination.<sup>92</sup> For example, at the Constitutional Convention, George Mason mentioned the need for federal regulation of the

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<sup>88</sup> *Nordyke v. King*, 364 F.3d 1025, 1031 (9th Cir. 2004) (Gould, J., joined by O’Scannlain, Kleinfeld, Tallman, and Bea, J.J., dissenting from denial of rehearing en banc).

<sup>89</sup> *Athos*, 8 Mod. Rep. at 144.

<sup>90</sup> See Kopel, *supra* note 33, 93 Mich. L. Rev. at 1355 (“[O]ne of the reasons Congress guaranteed the right of the people to keep and bear arms was so that a popular militia could be drawn from the body of the people.”) (footnote omitted). Thus, the *Silveira* court’s description of the militia as “the state-created and -organized military force,” 312 F.3d at 1069, is technically true but critically incomplete, because it ignores the composition of the militia.

<sup>91</sup> On the former distinction, see U.S. Const. art. I, § 8, cls. 12–16; art. I, § 10, cl. 3; art. II, § 2, cl. 1; amend. V; Articles of Confed. art. VI (contrasting a “body of forces” with “a well regulated and disciplined militia, sufficiently armed and accoutered.”); *Authority of President to Send Militia Into a Foreign Country*, 29 Op. Att’y Gen. 322, 322 (1912) (Wickersham, A.G.) (“[T]he militia has always been considered and treated as a military body quite distinct and different from the Regular or standing army.”).

<sup>92</sup> See Malcolm, *To Keep and Bear Arms*, *supra* note 33, at 125 (discussing concerns of English Whigs after the English Revolution of 1688–1689 to maintain a citizens’ militia as opposed to a select one); *id.* at 95–97, 103, 105 (discussing purges and selective disarmament of militia by Charles II and James II); *id.* at 63 (discussing Charles II’s select militia).

militia to ensure that it was adequately trained. He suspected that the states would not relinquish “the power over the whole” but would “over a part as a select militia.” He added that “a select militia” would be “as much as the Gen[eral] Gov[ernment] could advantageously be charged with,” and thus suggested that it receive power only over “one tenth part” of the militia per year. Oliver Ellsworth, later to be a Senator and Chief Justice, objected because a “select militia” either would be impractical or would cause “a ruinous declension of the great body of the Militia.”<sup>93</sup> Edmund Randolph, leader of the Virginia delegation, similarly equated the militia with “the whole mass” of the people.<sup>94</sup>

In the debate over ratification, both sides shared this broad understanding of “Militia.” Among the Federalists, Madison in *The Federalist* predicted that a federal army bent on oppression would be opposed by “a militia amounting to near half a million of citizens with arms in their hands”—a group that he likened to the citizen bands that had fought in the Revolution and linked to “the advantage of being armed, which the Americans possess over the people of almost every other nation.”<sup>95</sup> Alexander Hamilton described the militia as “the great body of the yeomanry and of the other classes of the citizens,” “the great body of the people,” and “the whole nation,” which he contrasted with a “select corps.”<sup>96</sup> A Connecticut Federalist writing as “The Republican” praised as “a capital circumstance in favour of our liberty” that “the people of this country have arms in their hands; they are not destitute of military knowledge; every citizen is required by Law to be a soldier; we are all martialled into companies, regiments, and brigades, for the defence of our country.”<sup>97</sup> In a speech, later published, in response to South Carolina’s vote to ratify, David Ramsay, a state legislator and delegate to the ratifying convention, praised the Constitution’s militia powers and asked, “What European power will dare to attack us, when it is known that the yeomanry of the country uniformly armed and disciplined, may on any emergency be called out to our defence . . . ?”<sup>98</sup> Maryland’s “Aristides,” in a fairly widely circulated pamphlet, wrote simply that “the militia . . . is ourselves.”<sup>99</sup>

Among the Anti-Federalists, Mason, in the Virginia Ratifying Convention, asked: “Who are the Militia? They consist now of the whole people,” while

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<sup>93</sup> Madison, *Notes of Debates*, *supra* note 44, at 478, 483–84 (Aug. 18, 1787).

<sup>94</sup> *Id.* at 515 (Aug. 23). John Adams also praised a militia of the whole people, as opposed to a select band, in works that he published in 1776 and 1787. See Part III.B.1 below.

<sup>95</sup> *The Federalist No. 46*, at 321 (James Madison). The population of all white males aged 16 and over in the 1790 census was 813,298, making Madison’s number a fair approximation of the citizen militia. See U.S. Dept. of Commerce, Bureau of the Census, 1 *Historical Statistics of the United States* 16 (1975).

<sup>96</sup> *The Federalist No. 29*, at 183–85 (Alexander Hamilton).

<sup>97</sup> 1 *The Debate on the Constitution* 712 (Bernard Bailyn ed., 1993).

<sup>98</sup> 2 *id.* at 507. For Ramsey’s biography, see *id.* at 1009.

<sup>99</sup> Aristides, *Remarks on the Proposed Plan of a Federal Government* (1788), reprinted in 15 *Ratification*, *supra* note 67, at 522, 533; see *id.* at 518–20 (note regarding circulation and responses).

warning that the new Congress might exempt the rich from service.<sup>100</sup> The Federal Farmer, a leading Anti-Federalist essayist, explained that the “militia, when properly formed, are in fact the people themselves,” and counseled “that regular troops, and select corps, ought not to be kept up without evident necessity.” If the federal government properly organized, armed, and disciplined the militia—including in it, “according to the past and general usage of the states, all men capable of bearing arms”—the country would have a “genuine” rather than “select militia.” Under such wise regulation, “the militia are the people.”<sup>101</sup>

This common sense of “Militia” also appeared in the House of Representatives’ debates on the Second Amendment, discussed below in Part III.C.2, and the Second Congress applied it in the first Militia Act, enacted in 1792, two months after the Second Amendment was officially ratified. The Act required “each and every able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years,” to be “enrolled in the militia” by the local commanding officer. Each enrolled citizen was required to provide his own arms—“a good musket or firelock” or “a good rifle”—plus ammunition and accouterments. These private arms were exempted from “all suits, distresses, executions or sales, for debt or for the payment of taxes.” The enrollees were required to appear, armed, “when called out to exercise, or into service,” although Congress left the details of exercise to each state.<sup>102</sup> (Since 1792, Congress has only expanded this definition, such as by eliminating the racial restriction and including some women.<sup>103</sup>) Finally, Noah Webster in his 1828 American dictionary defined “militia” in accord with this Act and the above understanding: “The militia of a country are *the able bodied men* organized into companies, regiments and brigades, with officers of all grades, and required by law to attend military exercises on certain days only, but at other times left to pursue their usual occupations.” They were “enrolled for discipline, but not engaged in actual service except in emergencies.”<sup>104</sup>

The analogy of the “Militia” to a select (and voluntary) corps such as the National Guard is further strained by the common law prohibition against the King’s

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<sup>100</sup> 10 *Ratification*, *supra* note 67, at 1312 (John P. Kaminski & Gaspare J. Saladino eds., 1993) (June 16, 1788).

<sup>101</sup> *Federal Farmer No. 18* (1788), reprinted in 2 *The Complete Anti-Federalist* 341–42 (Herbert J. Storing ed., 1981); see also *Federal Farmer No. 3* (1787), reprinted in *id.* at 242. Publius (Hamilton) recognized the *Federal Farmer* letters as among the best of the Anti-Federalists’. See *The Federalist No. 68*, at 457–58.

<sup>102</sup> Act of May 8, 1792, ch. 33, §§ 1–2, 1 Stat. at 271–72; see 2 Tucker’s *Blackstone*, *supra* note 60, at \*409 n.1.

<sup>103</sup> 10 U.S.C. § 311(a) (2000) (including in the militia “all able-bodied males at least 17 years of age and . . . under 45 years of age,” both citizens and those “who have made a declaration of intention to become” citizens, certain men between 45 and 64, and “female citizens of the United States who are members of the National Guard”).

<sup>104</sup> Webster, *American Dictionary*, *supra* note 55 (unpaginated) (emphasis added).

deploying the militia outside the country—a rule that Blackstone celebrated as part of the individual’s “absolute right” of “personal liberty.”<sup>105</sup> The Constitution appears to incorporate this rule, by specifying domestic reasons for the federal government to call out the militia: “to execute the Laws of the Union, suppress Insurrections and repel Invasions.”<sup>106</sup> Implicit in the common law rule is that the militia was so composed that its members ought to be treated as ordinary citizens doing their duty, rather than as soldiers. President Taft’s Attorney General reaffirmed this ancient rule in 1912 as Congress was developing the modern National Guard, which, partly to avoid this rule, was made a component of the regular military forces.<sup>107</sup>

The Supreme Court in *Miller*, relying on a brief historical survey, summarized as follows the definition of “Militia” that we have set out and explained above:

The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised *all males physically capable of acting in concert for the common defense*. “A body of citizens enrolled for military discipline.” And further, that ordinarily when called for service these men were expected to *appear bearing arms supplied by themselves* and of the kind in common use at the time.<sup>108</sup>

If, as the Court recognized and historical usage confirms, the “Militia” was composed of the general population of able-bodied men, an individual right of the whole people to keep and bear arms would make eminent sense. A large portion of the “people” would be required to appear occasionally for service or simply training, and they were expected to bring their private arms. If the people could be disarmed, it would then, among other things, be impossible for militiamen to make the required provision of their privately provided arms when called up, and the citizen militia would be undermined.

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<sup>105</sup> 1 William Blackstone, *Commentaries* \*134, \*138, \*413.

<sup>106</sup> U.S. Const. art. I, § 8, cl. 15.

<sup>107</sup> *Authority of President to Send Militia Into a Foreign Country*, 29 Op. Att’y Gen. 322, 322 (1912) (Wickersham, A.G.); see *Perpich v. Dep’t of Defense*, 496 U.S. 334, 341–44 (1990).

<sup>108</sup> 307 U.S. at 179 (emphases added); see *id.* at 179–82 (collecting historical support); *Presser v. Illinois*, 116 U.S. 252, 265 (1886) (“It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States.”); *Maryland v. United States*, 381 U.S. 41, 46 (1965) (describing pre-World War I militia as “a citizen army”).

### 3. The “Well Regulated” Militia

Advocates of the collective right and quasi-collective right views argue that the Amendment’s reference in its preface to a “well regulated” militia indicates that the preface refers to a select, organized body akin to today’s National Guard. They claim additional support for this argument from usage of the term “Militia” elsewhere in the Constitution, in the context of governmental power over the Militia.<sup>109</sup> No doubt the “Militia” was, through enrollment, exercise, and command when activated by a governor or president, a creature of the government. But it does not follow that the meaning of “Militia” as used in the Second Amendment depended on congressional (or state) legislation organizing or regulating the Militia. The word’s use elsewhere in the Constitution and the Amendment’s prefatory reference to a “well regulated Militia,” properly understood, in fact suggest the opposite.

The Constitution distinguishes not only between the “Militia” and the regular armed forces but also between different parts and conditions of the militia. The latter distinctions appear in (1) Article I, Section 8, Clause 15, authorizing Congress to “provide for *calling forth* the Militia”; (2) the immediately following clause authorizing Congress to “provide for *organizing*, arming, and disciplining the Militia, and for governing *such Part of them* as may be employed in the Service of the United States”; (3) Article II, Section 2, Clause 1, making the President Commander in Chief of “the Militia of the several States” when “called into the *actual Service* of the United States”; and (4) the Fifth Amendment, which withholds the protection of the Grand Jury Clause from persons whose cases arise in the militia, but only when “in *actual service* in time of War or public danger” (cases in the army and navy, by contrast, are always exempted).

These provisions indicate that the militia is of a size that will make complete mobilization usually unnecessary, that members of the militia will often not be in service (or that not all parts of the militia will always be in service), and that when any members are not employed in “actual service,” they ought to be treated as ordinary citizens. The “Militia” is both large and largely latent. In addition, the reference to “organizing . . . the Militia” suggests an entity that in some sense exists and is definable apart from congressional regulation, in contrast to “Armies,” which Congress must “raise,” pursuant to another power in Article I, Section 8. Congress might not “organiz[e]” *all* of the “Militia”; it might organize some parts differently from others; and it would be expected to give necessary precision to the definition of the body’s membership by laying down a specific age range for service (as Congress did in the first Militia Act). But the background meaning of the word would remain. As an Anti-Federalist writer recognized: “[T]he militia is divided into two classes, viz. active and inactive,” the former, he

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<sup>109</sup> See, e.g., *Silveira*, 312 F.3d at 1069–72.

expected, likely to “consist of young men chiefly.”<sup>110</sup> Thus, the use of “Militia” throughout the Constitution is consistent with the common understanding of the word at the Founding.

Nor does the preface’s phrase “well regulated” alter this sense of “Militia”; rather, it presupposes it. Having an armed citizenry, which the operative text protects by establishing a right of individuals, becomes a necessary (albeit not sufficient) condition for a well-regulated militia once one properly defines “Militia.” As one academic commentator has put it: “The Second Amendment simply forbids one form of inappropriate regulation,” which would ensure a militia that was *not* well regulated, namely “disarming the people from whom the militia must necessarily be drawn. . . . [T]he one thing the government is forbidden to do is infringe the right of the people, who are the source of the militia’s members, to keep and bear arms.”<sup>111</sup> A militia composed of the whole body of able-bodied male citizens and only infrequently meeting for state-sponsored exercise is more likely to be “well regulated” in the bearing of arms, and can more readily be trained and disciplined, if its members possess their private arms and are accustomed to them from usage for private purposes between exercises.<sup>112</sup> And an individual right of the people to have arms has the indirect effect of securing the ability of states at least to have their militias armed.<sup>113</sup> As the Court stated in *Miller*, the Second Amendment seeks “to assure the continuation and *render possible* the effectiveness of” the militia of “all males physically capable of acting in concert for the common defense.”<sup>114</sup> It protects the minimum for a well-regulated citizen militia.

In addition, the standard for a “well regulated *Militia*,” as opposed to a well-regulated *select* militia, or well-regulated army, presupposes the background meaning of “Militia” by taking into account the body’s large size and varied source. As the Militia Act of 1792 contemplated, it might be enough to have a county officer enroll persons and ensure that they possessed arms and knew how to use them through basic training once or twice a year. Similarly, the Virginia Declaration of Rights of 1776 defined “a well-regulated militia” as simply being “composed of the body of the people, trained to arms.”<sup>115</sup> And the first New York Constitution declared that “the militia” should always “be armed and disciplined,

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<sup>110</sup> Aristocrotis, *The Government of Nature Delineated, or An Exact Picture of the New Federal Constitution* (1788), reprinted in 3 *Complete Anti-Federalist*, *supra* note 101, at 202.

<sup>111</sup> Lund, *supra* note 33, 31 Ga. L. Rev. at 25, 26.

<sup>112</sup> See *Silveira*, 328 F.3d at 579 (Kleinfeld, J., joined by Kozinski, O’Scannlain, and T.G. Nelson, JJ., dissenting from denial of rehearing en banc) (“The panel seems to imagine that a well regulated militia is a people disarmed until the government puts guns in their hands after summoning them to service.”).

<sup>113</sup> See Part IV.A below for St. George Tucker’s discussion of a similar point.

<sup>114</sup> 307 U.S. at 178–79 (emphasis added).

<sup>115</sup> Va. Decl. of Rights § 13 (1776), reprinted in 7 *Federal and State Constitutions*, *supra* note 78, at 3814.

and in readiness for service” because “it is the duty of every man who enjoys the protection of society to be prepared and willing to defend it.”<sup>116</sup>

Even those Founders skeptical of the benefits of the citizen militia, and who advocated a more highly regulated select corps, still recognized the distinction between the proper regulation of the two. Alexander Hamilton in *The Federalist* argued that it would be both “futile” and “injurious” for Congress to attempt to “disciplin[e] *all the militia* of the United States.” Most enrolled citizens would need extensive “time and practice . . . under arms for the purpose of going through military exercises and evolutions as often as might be necessary to acquire the degree of perfection which would intitle them to the character of a well-regulated militia.” But such a burden on so many citizens “would be a real grievance to the people and a serious public inconvenience and loss.” Thus, as to “*the people at large*,” he expected that “[I]ittle more can reasonably be aimed at . . . than to have them properly armed and equipped” and, for this purpose, “assemble them once or twice” a year. He therefore recommended that Congress use its constitutional power to provide for organizing the militia also to form a select militia—“*a select corps* of moderate size.”<sup>117</sup> Hamilton was reiterating George Washington’s well-known recommendations to Congress for a two-tiered militia, consisting of (1) “the Citizens of America . . . from 18 to 50 years of age,” who would be put “on *the Militia Rolls*” and given minimal training, and (2) “*a Corps* in every State” consisting of those aged 18–25.<sup>118</sup> From the opposite political pole, the Federal Farmer likewise recognized that Congress might make just such distinctions in “modelling the militia” and warned that creation of a “*select corps* of militia” would lead to “inattention to *the general militia*.”<sup>119</sup>

This understanding of the “well regulated Militia,” and of the possibilities for congressional organization of it (or not), leads to a view of the preface that not only fits the meaning of “Militia” in common contemporaneous usage, including throughout the Constitution, but also most agrees with the meaning of the Second Amendment’s operative text setting out a “right of the people.” The “well regulated Militia” and the “people” were not identical, but because of their close relationship, a right of the latter—of individuals—to keep and bear arms would facilitate the former. By contrast, a view rejecting the individual right on the basis of the preface’s reference to the “well regulated Militia” struggles to harmonize the operative language establishing a seemingly general and individual right with that prefatory language. As Justice Scalia has written, a narrow definition of “Militia” “produces a guarantee that goes far beyond its stated purpose—rather

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<sup>116</sup> N.Y. Const. § 40 (1777), *reprinted in 5 id.* at 2637.

<sup>117</sup> *The Federalist* No. 29, at 183–84 (Alexander Hamilton) (emphases added).

<sup>118</sup> *Sentiments on a Peace Establishment* (1783), *reprinted in 3 The Founders’ Constitution* 129 (Phillip B. Kurland and Ralph Lerner eds., 1987) (emphases added).

<sup>119</sup> *Federal Farmer No. 3*, *reprinted in 2 Complete Anti-Federalist*, *supra* note 101, at 242; *Federal Farmer No. 18*, *reprinted in id.* at 342 (emphases added).

like saying ‘police officers being necessary to law and order, the right of the people to carry handguns shall not be infringed.’”<sup>120</sup> The “Militia” on this erroneous view consists only of those few citizens whom a state chooses to specially organize, arm, and train into professional units, which requires one to reject the normal, unambiguous meaning of the operative text as overbroad, rewriting “the people” to mean either “the select militia” or “the State.” If that were the true meaning, the Amendment’s authors chose singularly inartful language.

#### 4. The “Security of a Free State”

The preface’s express linking of the “well regulated Militia” to the ultimate necessity of “the security of a free State” is also fully consistent with the conclusion that the “right of the people to keep and bear Arms” is a personal one. The security of a free state at the Founding no doubt was understood to include those things necessary to the security of any state, such as “to execute the Laws . . . , suppress Insurrections and repel Invasions.”<sup>121</sup> But the security of a *free* state was not just these things. It also was understood to include the security of freedom in a state. Thus, while Blackstone recognized the individual liberty of the press as “essential to the nature of a free state,” pre-1787 state constitutions described the same right as “essential to the security of freedom in a state.”<sup>122</sup> The Preamble of the Constitution states the goal of making “secure the Blessings of Liberty,” and the Fourth Amendment highlights the importance of the individual “right of the people to be secure in their persons, houses, papers, and effects.” A secure *free* state was one in which liberties and rights were secure.

This clause of the Second Amendment’s preface reinforces the individual right to keep and bear arms in two related ways—by supporting the broad meaning of “Militia” set out above, and by identifying a benefit for individuals of the right that the operative text secures. First, to say at the time of the Founding that the militia was necessary to the security of a “free State” was to refer to the citizen militia, composed of the people, who retained the right to keep and use their private weapons. A select militia, particularly if it existed to the exclusion of the citizen militia, might undermine the free state, if citizens excluded from it were left defenseless, or if it disarmed the citizens and infringed their other rights (or both). As we show in Part III.A, that is what had happened in England during the

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<sup>120</sup> Antonin Scalia, Response, in *A Matter of Interpretation: Federal Courts and the Law* 137 n.13 (1997).

<sup>121</sup> U.S. Const. art. I, § 8, cl. 15; see *id.* amend V (discussing militia service in “War or public danger”).

<sup>122</sup> 4 William Blackstone, *Commentaries* \*151; e.g., Mass. Const. pt. I, art. 16 (1780), reprinted in 3 *Federal and State Constitutions*, *supra* note 78, at 1892. Similarly, the English Declaration of Rights, well known to the Founding Generation, see Part III.A below, charged King James II with having sought to “subvert and extirpate” the “liberties of this kingdom” by taking several actions “utterly and directly contrary to” the “freedom of this realm.” 1 W. & M., 2d Sess., c. 2, § 1 (1689).

strife that produced in 1689 the express right of individual subjects to have and use arms for their defense, the ancestor of the right in the Second Amendment.<sup>123</sup> Thus the Virginia Declaration of Rights, the only state bill of rights before the adoption of the Second Amendment that expressly tied the militia to the security “of a free State,” also emphasized that the “militia” was “composed of the body of the people.”<sup>124</sup>

Contemporaneous writers across the political spectrum acknowledged the link between the citizen militia and securing the freedom of a state. “The Republican” praised “a militia of freemen” as among the “principal circumstances which render liberty secure,” and singled out as “a capital circumstance in favour of our liberty” that “the people themselves are the military power of our country,” having “arms in their hands” and “military knowledge.”<sup>125</sup> The Federal Farmer listed among the “military forces of a free country” the “militia,” by which he meant “the people themselves . . . when properly formed.” A citizen militia was critical to “the duration of a free and mild government.” Absent it, and in the face of an “anti-republican” select militia, “the substantial men, having families and property, will generally be without arms, without knowing the use of them, and defenceless; whereas, to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them.”<sup>126</sup> James Burgh, a Scotsman whose 1774 *Political Disquisitions* were well-known in America, including being cited in *The Federalist*, wrote that a “good militia” formed “the chief part of the constitution of every free government” and would “preserve the public liberty.” He added that “[t]he possession of arms is the distinction between a freeman and a slave. . . . [H]e who thinks he is his own master, and has anything he may call his own, ought to have arms to defend himself and what he possesses, or else he lives precariously and at discretion.”<sup>127</sup>

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<sup>123</sup> See also Malcolm, *To Keep and Bear Arms*, *supra* note 33, at 50–53, 115–16, 123 (militia officers’ use of discretionary power to disarm); *id.* at 45–46 (disarmament by Charles II prior to 1662); *id.* at 85 (disarmament by militia in 1678); *id.* at 103 (use of militia by James II to disarm suspicious persons); *id.* at 105 (attempted use of militia in 1686 to disarm by enforcing game act); *id.* at 31 (in Civil War); see also *id.* at 92–93, 95 (in response to 1683 Rye House plot; confiscated arms given to militia); *id.* at 100 (disarmament by Charles II in western England early in reign, and in response to Rye House plot later). Efforts to disarm and undermine the militia also included requiring its members to “store” their arms in government magazines. See *id.* at 38, 78–79, 96–97; see also *id.* at 3, 5, 10–11 (discussing private ownership and storage prior to English Civil War, and failed plans to require public storage). The actions of white militias toward freed blacks in the South after the American Civil War were similar. See Part IV.C below.

<sup>124</sup> Va. Decl. of Rights § 13 (1776), reprinted in 7 *Federal and State Constitutions*, *supra* note 78, at 3814; see also Md. Const., Decl. of Rights § 25 (1776), reprinted in 3 *id.* at 1688 (“That a well-regulated militia is the proper and natural defence of a free government.”).

<sup>125</sup> 1 *Debate on the Constitution*, *supra* note 97, at 711–12.

<sup>126</sup> *Federal Farmer No. 18*, reprinted in 2 *Complete Anti-Federalist*, *supra* note 101, at 341–42.

<sup>127</sup> James Burgh, *Political Disquisitions*, reprinted in part in 3 *Founders’ Constitution*, note 118, at 126, 125; see *The Federalist No. 56*, at 382 n.\* (James Madison); see also 2 Tucker’s *Blackstone*, *supra* note 60, at \*245 n.7 (quoting Burgh’s *Disquisitions*). In both passages, Burgh was loosely

Thus, “every male” should be trained in the use of arms, or at least “all men of property.”<sup>128</sup>

Second, and related, the freedom of a state was understood at the time of the Founding to include a citizen’s individual right of self-defense (that is, defense of his right to life and personal security) when the state cannot assist him. An individual right to arms such as that secured by the Second Amendment’s operative text helps to preserve this basic right and thus a free state. As the preface indicates, the existence of a well-regulated citizen militia further secures the link between such an individual right and this aspect of a free state (by increasing the number of persons equipped and trained to exercise the right well), but, as the discussion of the militia in the previous paragraph suggests, this link was not understood to be confined to one’s actions while participating in even such a broad-based entity.<sup>129</sup> Blackstone’s summary of key English rights explains this point. With no mention of the militia, he described the “right of having and using arms for self-preservation and defence” as the last security of individual English subjects for keeping the state, including themselves, free:

[T]he rights, or, as they are frequently termed, the liberties of Englishmen . . . consist primarily, in the free enjoyment of personal security, of personal liberty, and of private property. So long as these remain inviolate, the subject is perfectly free; for every species of compulsive tyranny and oppression must act in opposition to one or other of these rights, having no other object upon which it can possibly be employed. To preserve these from violation, it is necessary, that the constitution of parliament be supported in its full vigour; and limits, certainly known, be set to the royal prerogative. And lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular admin-

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quoting Andrew Fletcher, a prominent member of the Scottish Parliament prior to union with England in 1707. See *A Discourse of Government With Relation to Militias* (1698), reprinted in Andrew Fletcher, *Political Works* 21–22 (John Robertson ed., 1997); *Speeches by a Member of the Parliament, No. 7* (1703), reprinted in *id.* at 149–50. Regarding Fletcher and Burgh, see David Thomas König, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of “the Right of the People to Keep and Bear Arms,”* 22 L. & Hist. Rev. 119, 125–26, 136–39 (2004).

<sup>128</sup> Burgh, *Political Disquisitions*, reprinted in *3 Founders’ Constitution*, note 118, at 124, 126. As Fletcher put it: “I cannot see, why arms should be denied to any man who is not a slave, since they are the only true badges of liberty . . . neither can I understand why any man that has arms, should not be taught the use of them.” *A Discourse of Government*, reprinted in Fletcher, *Political Works*, *supra* note 127, at 23.

<sup>129</sup> The duty to serve in the militia and the right to possess or carry weapons for self-defense were related but distinct in colonial America. One might have the latter without the former. See Cottrol & Diamond, *supra* note 33, 80 Geo. L.J. at 325–37 (surveying colonial laws and explaining the development of “the view that the security of the state was best achieved through the arming of all free citizens,” regardless of eligibility for militia service); see also Part II.B.1 above (discussing right to “keep” arms for private purposes).

istration and free course of justice in the courts of law; next, to the right of petitioning the king and parliament for redress of grievances; and, lastly, to the right of having and using arms for self-preservation and defence.

This right to arms, Blackstone added, facilitates self-defense “when the sanctions of society and laws are found insufficient to restrain the violence of oppression.”<sup>130</sup> John Locke, although not explicitly discussing arms, similarly explained the individual right of self-defense that a free society allows. Discussing the right of self-defense against a robber, he wrote: “I have no reason to suppose that he who would *take away my liberty*, would not, when he had me in his power, take away everything else.” Therefore “the law, which was made for my preservation, where it cannot interpose to secure my life from present force, which if lost, is capable of no reparation, permits me my own defence.”<sup>131</sup>

It is therefore reasonable to conclude that the ability of a “right of the people to keep and bear Arms” to further the Second Amendment preface’s ultimate end of the “security of a free State” consisted not merely in the existence of a trained band ready to act as soldiers should the state’s *government* call upon them, but also in the ability of the citizens (many of them part of the privately armed citizen militia), by individually keeping and bearing arms, to help secure the freedoms of the state and its citizens.<sup>132</sup> Thus, the “people” in the Second Amendment were distinct from the “Militia” and a “State,” but a right of the people to keep and bear arms was understood both to facilitate a well-regulated militia and to help maintain a state that was free. By contrast, the collective right and quasi-collective right views would sanction not only the creation of a select militia (to the exclusion of the citizen militia) but also the disarming of the rest of the citizenry, a

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<sup>130</sup> 1 William Blackstone, *Commentaries* \*144. Blackstone also described the fundamental “right of personal security” as including protection against “loss of limb,” so as to guard a man’s ability “to protect himself from external injuries in a state of nature,” and condemned any destruction of limbs as “a manifest breach of civil liberty,” *id.* at \*129, \*130; and he set out the basic common law rule of self-defense, “the primary law of nature,” by which it is lawful for a person “forcibly attacked in his person or property . . . to repel force by force” without being liable for breach of the peace or a resulting homicide, 3 *id.* at \*3–4. The importance of this right of self-defense was reinforced by the absence of any constitutional duty of government to defend citizens’ lives, liberty, or property. See *DeShaney v. Winnebago Cnty. Soc. Servs. Dep’t*, 489 U.S. 189, 195–97 (1989).

<sup>131</sup> John Locke, *Second Treatise of Government* §§ 18–19, at 12–13 (Richard H. Cox ed., 1982) (1689); see also *id.* §§ 204–10, at 126–29 (similar). Blackstone and Locke disagreed on the exact scope of the right of self-defense. 4 William Blackstone, *Commentaries* \*181–82; see also 1 *id.* at \*251. Locke was, after Blackstone and Montesquieu, the writer whom American political writers of the Founding cited most. Malcolm, *To Keep and Bear Arms*, *supra* note 33, at 142 & 214 n.44. His thinking is particularly evident in the Declaration of Independence. See also 2 Tucker’s Blackstone, *supra* note 60, at \*161 & n.25.

<sup>132</sup> See Van Alstyne, *supra* note 33, 43 Duke L.J. at 1243 (The Second Amendment “looks to an ultimate reliance on the common citizen who has a right to keep and bear arms . . . as an essential source of security [for] a free state.”); see also Lund, *supra* note 33, 31 Ga. L. Rev. at 24.

result antithetical to the true “Militia” as understood at the Founding and to the “free State” that the Founding Generation understood it to secure.

## **D. Structural Considerations**

Our conclusion that the text of the Second Amendment protects an individual right is further confirmed by the structure of the Constitution, in particular the Amendment’s placement and its inter-relation with the powers that the Constitution grants over the militia.

### **1. The Bill of Rights**

The Second Amendment is embedded within the Bill of Rights. Every one of the other rights and freedoms set forth in the first nine amendments of the Bill—whether or not phrased as a “right of the people”—protects individuals, not governments; none of its provisions protects persons only in connection with service to the government.<sup>133</sup> As Thomas Cooley summarized, writing of the Bill’s first eight amendments, “[I]t is declared that certain enumerated liberties of the people shall not be taken away or abridged.”<sup>134</sup> It is therefore reasonable to interpret the Second Amendment to protect individuals just as the rest of these nine amendments do.

More particularly, the Second Amendment is located within a subset of the Bill of Rights amendments, the First through Fourth, that relates most directly to personal freedoms (as opposed to judicial procedure regulating deprivation by the government of one’s life, liberty, or property)—the amendments that, in Story’s words in his *Commentaries*, “principally regard subjects properly belonging to a bill of rights.”<sup>135</sup> These four amendments concern liberties that are tied to the right of individuals to possess and use certain property (the printing “press” in the First

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<sup>133</sup> Cf. *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992) (rejecting argument that the personal “liberty” that the Fourteenth Amendment protects “encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments”) (emphasis added) (citation omitted); *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion) (similar, quoting *Poe v. Ullman*, 367 U.S. 497, 542–43 (1961) (Harlan, J., dissenting)); *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950) (describing First, Second, Fourth, Fifth, and Sixth Amendments as the “civil-rights Amendments”); *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897) (describing Bill of Rights as embodying “certain guaranties and immunities which we had inherited from our English ancestors”). While some might argue that, as an original matter, the First Amendment’s Establishment Clause (which makes no reference to any “right” or “freedom”) was an exception to this rule, the Supreme Court has held that it too creates an individual right, applicable even against states. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 678 (2002) (Thomas, J., concurring); *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947); David Currie, *The Constitution in the Supreme Court: The Second Century* 339–40 (1990).

<sup>134</sup> Cooley, *General Principles*, *supra* note 41, at 200.

<sup>135</sup> Story, *Abridgement*, *supra* note 66, § 984, at 698 (commencing discussion of First through Fourth, and Eighth through Tenth Amendments).

Amendment,<sup>136</sup> “house[s]” in the Third’s restriction on quartering soldiers, and “houses, papers, and effects” in the Fourth’s restriction on searches and seizures), or otherwise to act without undue governmental interference (worship, speech, assembly and petition). Again, it seems reasonable to interpret the Second Amendment, consistently with this context, to set out another personal liberty (keeping and bearing) and privileged form of individual property (arms), useful for protecting not only the citizen’s person but also the “houses” that the Third and Fourth Amendments guard.<sup>137</sup>

Finally, the right in the Second Amendment immediately follows the right to assemble and petition, which concludes the First Amendment. The latter right is undeniably personal and individual, not depending on governmental organization, regulation, or service. And the two are aligned, not only in their placement but also in their origin, purpose, and limitations. Antecedents of both appeared in proximity in the English Bill of Rights of 1689.<sup>138</sup> Blackstone, in the passage block-quoted in the previous subpart, discussed in immediate succession their dual utility as guards of the great individual rights of life, liberty, and property,<sup>139</sup> and he did likewise in discussing the criminal law’s limitations on abuses of those rights.<sup>140</sup> St. George Tucker, the first leading American commentator on Blackstone and the Constitution (discussed more in Part IV.A below), noted that both rights had been transplanted to the United States from England, both stripped of many English restrictions.<sup>141</sup> It follows that the former right—that secured by the Second Amendment—also would be individual.

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<sup>136</sup> See 4 William Blackstone, *Commentaries* \*152 n.a.; John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. Chi. L. Rev. 49, 92–94 (1996).

<sup>137</sup> Compare 1 William Blackstone, *Commentaries* \*138 (“The third absolute right, inherent in every Englishman, is that of property: which consists in the free *use, enjoyment, and disposal* of all his acquisitions, without any control or diminution, save only by the laws of the land.”) (emphasis added), with *id.* at \*144 (recognizing “the right of *having and using* arms”) (emphasis added); see Part II.B.1 above (discussing English cases in 1700s approving the “keeping” of arms for defense of one’s self and home).

<sup>138</sup> 1 W. & M., 2d Sess., c. 2, § 1, paras. 5 & 7 of the list of rights.

<sup>139</sup> See also 1 William Blackstone, *Commentaries* \*143–44 (similar); 2 Jean L. De Lolme, *The Rise and Progress of the English Constitution* 886–87 (A.J. Stephens ed., 1838) (1784) (noting that English Bill of Rights “expressly ensured to individuals the right of publicly preferring complaints against the abuses of the government, and, moreover, of being provided with arms for their own defence,” and then quoting 1 William Blackstone, *Commentaries* \*144 regarding these rights).

<sup>140</sup> See 4 *id.* at \*145–49 (discussing the following misdemeanor breaches of the peace: affray, riot, rout, unlawful assembly, tumultuous petitioning, forcible entry or detainer, and going armed with dangerous or unusual weapons to the terror of the people). Among felonies against the public peace, Blackstone first listed violation of the Riot Act against “riotous assembling of twelve persons” and then described “unlawful hunting” in certain parks, which involved being disguised and “armed with offensive weapons.” *Id.* at \*142–44.

<sup>141</sup> 2 Tucker’s Blackstone, *supra* note 60, at \*143–44 nn. 38–41. See also *United States v. Cruikshank*, 92 U.S. 542, 551–53 (1876) (analyzing the two rights similarly); *Logan v. United States*, 144 U.S. 263, 286–87 (1892) (same).

## 2. The Militia Powers

Interpreting the Second Amendment in light of the militia powers granted to the federal government and the states in the original Constitution likewise suggests an individual right to keep and bear arms rather than a “right” of states, against the federal government, to maintain select militias or a quasi-collective right to be exercised only by persons who serve in such entities. Clauses 15 and 16 of Article I, Section 8, respectively grant power to Congress:

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; [and]

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

In addition, Article II, Section 2, makes the President “Commander in Chief . . . of the Militia of the several States, when called into the actual Service of the United States.”

These clauses, independently of the Second Amendment, presuppose the existence of functioning state militias and leave significant powers over them to the states. The states expressly retain the powers to appoint all officers and to train the militia according to federally specified rules. They implicitly retain the power of “governing” any parts of the militias not in actual service to the federal government, and of having those state-appointed officers govern the militias even when in such service, subject to the President’s supreme authority. The provision regarding officers is why Hamilton could argue credibly in *The Federalist* that the states always would retain “a preponderating influence over the militia.”<sup>142</sup> The Constitution, in elsewhere prohibiting states from “keep[ing] Troops, or Ships of War in time of peace,” while still allowing them to “engage in War” if “actually invaded” or under an imminent threat, contemplates that the states will have, and have power to employ, usable militias to provide necessary defense and emergen-

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<sup>142</sup> *The Federalist No. 29*, at 185 (Alexander Hamilton); see also *The Federalist No. 46*, at 321–22 (James Madison).

cy war-making ability.<sup>143</sup> More broadly, the states implicitly retain the power to call out the militia on their own for domestic purposes.<sup>144</sup>

The original Constitution also leaves to the states concurrent power to provide for organizing, arming, and disciplining their militias, so long as in so doing they do not interfere with the federal power. This interpretation has been recognized from the beginning: At the critical Virginia Ratifying Convention, Henry Lee (future Governor of Virginia and congressman), Edmund Randolph (a Framers who became the first Attorney General), Madison, and John Marshall all made this textual argument in response to attacks on the federal power to make such provision.<sup>145</sup> Story found the arguments for such a concurrent power “in their structure and reasoning satisfactory and conclusive.”<sup>146</sup> The Supreme Court approved this reading in 1820 in *Houston v. Moore*,<sup>147</sup> and has recently reiterated it. Looking to the “general plan” of the Constitution, the Court noted in 1990 that, “Were it not for the Militia Clauses, it might be possible to argue,” much as one could regarding federal power over foreign policy and the armed forces, “that the constitutional allocation of powers precluded the formation of organized state militia. The Militia Clauses, however, subordinate any such structural inferences to an express permission while also subjecting state militia to express federal limitations.”<sup>148</sup> Even the Ninth Circuit in *Silveira* so interpreted Article I, Section 8, Clause 16: “The language indicates that the grant of power [to Congress] is permissive. . . . Nothing in the Article or elsewhere in the Constitution appears to bar the states from choosing to arm their respective militias as they wish.”<sup>149</sup>

In at least two respects, the above militia powers in the Constitution suggest an individual right view of the Second Amendment. First, any constitutional amendment securing to the states power to maintain militias would have been largely redundant, whether the amendment protected the power through a “right” of states or a right restricted to persons serving in militia units that a state had organized. A provision should not be read to be redundant if another reasonable interpretation

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<sup>143</sup> U.S. Const. art. I, § 10, cl. 3. See *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 52 (1820) (Story, J., dissenting); Va. Ratif. Conv., in *10 Ratification*, *supra* note 67, at 1307 (remarks of John Marshall, June 16, 1788).

<sup>144</sup> See Story, *Abridgement*, *supra* note 66, § 593, at 425; Va. Ratif. Conv., in *10 Ratification*, *supra* note 67, at 1304, 1311 (remarks of James Madison, June 16, 1788); *id.* at 1306–07 (remarks of John Marshall, same).

<sup>145</sup> Compare *9 Ratification*, *supra* note 67, at 1074 (John P. Kaminski & Gaspare J. Saladino eds., 1990) (H. Lee, June 9, 1788), *id.* at 1102 (Randolph, June 10, 1788), *10 id.* at 1273 (Madison, June 14, 1788), *id.* at 1306–08 (Marshall, June 14, 1788); with *9 id.* at 957–58, 1066 (Patrick Henry, June 5 & 9, 1788), *10 id.* at 1270–71 (George Mason, June 14, 1788), *id.* at 1305 (William Grayson, June 16, 1788). Henry Lee should not be confused with his Anti-Federalist cousin Richard Henry Lee.

<sup>146</sup> 3 Story, *Commentaries*, *supra* note 75, § 1202, at 85–86.

<sup>147</sup> 18 U.S. (5 Wheat.) 1 (1820). See Part IV.B.1 below.

<sup>148</sup> *Perpich*, 496 U.S. at 353–54 (footnotes omitted).

<sup>149</sup> 312 F.3d at 1081 n.43.

exists, and the individual right view of the Amendment is such an interpretation. Second, one also would expect a protection of the states' militia powers to use language analogous to that of Clause 16, which concludes by "*reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.*"<sup>150</sup> Clause 16's parallel to the protection of state power in the Tenth Amendment, which provides that certain *powers* are "*reserved to the States respectively*" (while mentioning "the people" separately), is unmistakable, as is the contrast between such language and the Second Amendment's protection of a "right of the people." Given the ready availability of such language, it would be both surprising and inartful for a protection of state authority to create and maintain organized militias to be phrased as the Second Amendment is, whether one conceives of the protection as belonging to the states directly or to those serving it.

The Militia Clauses therefore suggest that the Second Amendment, to the extent that it furthers the states' authority to maintain organized militias, does so indirectly, as we discussed in Part II.C.2 & 3, by ensuring the minimum of a "well regulated Militia"—that the States' *people*, the pool for the citizen militia, would continue to be able to keep and to bear their private arms, having them ready and being familiar with them. Thus the Militia Clauses, along with the structure of the Bill of Rights and the preface of the Second Amendment, all support the personal, individual right to keep and bear arms that the Amendment's operative text sets out.

### **III. The Original Understanding of the Right to Keep and Bear Arms**

In the previous part, we focused on the text and structure of the Constitution, considering the meaning of the Second Amendment's words and phrases when they were adopted and how the Amendment's meaning is informed by its interrelation with the rest of the Constitution. In this part, we take a broader view and consider the Anglo-American right to arms as it existed at the time of the Founding and informed the adoption of the Second Amendment. This history, like the text, indicates that the Amendment secures an individual right.

We first consider the historical context of the right to arms, both (A) in England beginning with the Revolution of 1688–1689 and (B) in America through the American Revolution and the first state constitutions. The right was consistently a personal one. Beginning with the right of individual English subjects to have arms for their defense, it was supplemented in revolutionary America with the notion that a citizen militia, comprising the armed citizenry, was a particularly important means of securing free government. As one judge recently put it, the Americans of the Founding Generation "were the heirs of two revolutions," both of which had

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<sup>150</sup> As we explain below in Part III.C, several state ratifying conventions unsuccessfully proposed similar language in suggested amendments distinct from those securing the right to bear arms.

impressed upon them the importance of an individual right to have and use arms.<sup>151</sup> This background understanding of the right is inconsistent with either the collective right or quasi-collective right views. Next, in Part III.C, we turn to (1) the framing and ratification of the Constitution and (2) the framing and ratification of the Second Amendment. This history demonstrates that the background understanding, far from being transformed or curtailed, was incorporated in that Amendment, just as the Bill of Rights incorporated many other traditional rights of individuals. By contrast, separate proposals to amend the Constitution to safeguard powers of the states to establish and maintain organized militias failed.

### **A. The Right Inherited From England**

As the Supreme Court has recognized, “[t]he historical necessities and events of the English constitutional experience . . . were familiar to” the Framers and should “inform our understanding of the purpose and meaning of constitutional provisions.”<sup>152</sup> This rule is particularly applicable to provisions such as the Second Amendment, because “[t]he law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors.”<sup>153</sup>

The right to arms that colonial Americans inherited from England had been set out first in the English Declaration of Rights of 1689, and then had been expounded by William Blackstone in his authoritative *Commentaries on the Laws of England* in the decade before the American Revolution. Both the Declaration and Blackstone made clear that the English right was a personal, individual one, not a “right” belonging to any government or restricted to persons in governmental service. The English right could not have been a federalism provision, because England lacked a federal structure; and neither the Declaration nor the law as expounded by Blackstone conditioned the right on a subject’s service in any militia.

The Declaration of Rights was a product of the English Revolution of 1688–1689 (commonly known as the Glorious Revolution). In 1660, a special “Convention” Parliament had restored the English monarchy by crowning Charles II,<sup>154</sup> and two statutes enacted under him provided background for the Declaration’s provisions on arms. First was the Militia Act, enacted by the royalist Parliament in

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<sup>151</sup> *Silveira*, 328 F.3d at 580 (Kleinfeld, J., joined by Kozinski, O’Scannlain, and T.G. Nelson, JJ., dissenting from denial of rehearing en banc).

<sup>152</sup> *Loving v. United States*, 517 U.S. 748, 766 (1996).

<sup>153</sup> *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897), discussed further below in Part IV.D.

<sup>154</sup> See 1 William Blackstone, *Commentaries* \*151.

1662.<sup>155</sup> It authorized militia officers on their own warrants “to search for and seize all arms” of anyone they judged “dangerous to the peace of the kingdom,” including through entering houses by force if necessary, the arms to be handed over to the militia and no judicial recourse being available.<sup>156</sup> Charles II repeatedly used this power,<sup>157</sup> aided not only by the regular militia but also by a volunteer army that he had organized unilaterally,<sup>158</sup> and by a select militia of about 15,000 that he formed in 1666.<sup>159</sup> The second statute was the Game Act of 1671, which, in the name of protecting wildlife, was “the first law in English history that took from the majority of Englishmen the privilege of having firearms.”<sup>160</sup> It outlawed possession of guns (not just their use in hunting) by anyone not among the few rich qualified to hunt game.<sup>161</sup>

Concerns escalated after the accession in 1685 of Charles’s brother, King James II. He was openly Roman Catholic, at a time of sharp political distrust between England’s Protestants and Catholics.<sup>162</sup> He disarmed the Protestant militia of Ireland by seizing their arms and placing them in government magazines, while returning the arms of Ireland’s Roman Catholics. In England, he continued to use the militia to disarm persons of questioned loyalties, including through strictly

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<sup>155</sup> The Founders were well aware of the events leading up to the Declaration. A delegate at the Massachusetts Ratifying Convention, warning against overreacting to the weakness of the Articles of Confederation, pointed to the Restoration, in which the people, “so vexed, harassed and worn down . . . [had] run mad with loyalty, and would have given Charles any thing he could have asked.” 1 *Debate on the Constitution*, *supra* note 97, at 897 (remarks of Charles Turner, Jan. 17, 1788). A delegate at Virginia’s convention drew the opposite lesson: The new Constitution would prevent the anarchy that had led England into the arms of Charles II. 2 *id.* at 756 (remarks of Zachariah Johnston, June 25, 1788).

<sup>156</sup> 13 & 14 Car. II, c. 3, § 14.

<sup>157</sup> Malcolm, *To Keep and Bear Arms*, *supra* note 33, at 36, 38, 43, 45–48, 50–53, 85, 100, 115–16, 123; *see also id.* at 92–93, 95; Lois G. Schwoerer, *The Declaration of Rights, 1689*, at 76 (1981) (“Charles II had made effective use of” the militia acts “to try to snuff out political and religious dissent,” disarming individuals and towns and confiscating weapons). He had begun doing so as soon as he assumed the throne. An interim act in 1661 approved his actions and provided indemnity to militiamen. 12 Car. II, c. 6, § 3 (favorably recognizing that “divers arms have been seized and houses searched for arms”); *cf. The Federalist No. 69*, at 465 n. (Alexander Hamilton) (discussing 1661 act).

<sup>158</sup> Malcolm, *To Keep and Bear Arms*, *supra* note 33, at 36–39.

<sup>159</sup> *Id.* at 63. *See also* Schwoerer, *Declaration*, *supra* note 157, at 75–76 (describing Charles II’s actions, including disarmament, and noting rise of complaints from Commons beginning in 1668).

<sup>160</sup> Malcolm, *To Keep and Bear Arms*, *supra* note 33, at 12; *see id.* at 69–76; Schwoerer, *Declaration*, *supra* note 157, at 78 (describing it as “the most stringent and comprehensive of the game laws”) (internal quotation marks omitted).

<sup>161</sup> 22 & 23 Car. II, c. 25, § 3 (providing that all who did not have estate “of the clear yearly value of one hundred pounds” per year were “not allowed to have or keep for themselves, or any other person or persons, any guns, bows, greyhounds . . . or other engines”).

<sup>162</sup> *See* 4 William Blackstone, *Commentaries* \*55 (explaining various legal disabilities on certain Roman Catholics, including several dating from English Revolution or earlier, by stating that such persons “acknowledge a foreign power, superior to the sovereignty of the kingdom”); *id.* at \*58 (hoping that “a time . . . should arrive” soon when it would be safe to “review and soften these rigorous edicts”).

enforcing the Game Act, although he ultimately preferred to undermine the militia (whose loyalty he questioned), by restricting musters. He also accelerated and expanded his brother's policy of purging opponents, and Protestants in general, from the militia's and army's officer corps, and geometrically enlarged the standing army.<sup>163</sup>

James II fled soon after William of Orange landed in England in late 1688 at the invitation of leading Englishmen. A Convention Parliament in early 1689 adopted the Declaration of Rights, which William and his wife Mary (James's daughter) accepted before Parliament proclaimed them King and Queen, and which the ensuing regular Parliament enacted as the Bill of Rights.<sup>164</sup> A hundred years later, Alexander Hamilton in *The Federalist* celebrated "the revolution in 1688," when at last "English liberty was completely triumphant."<sup>165</sup>

The Declaration first listed twelve indictments of James II for having attempted to subvert "the laws and liberties of this kingdom," including:

5. By raising and keeping a standing army within this kingdom in time of peace, without consent of parliament, and quartering soldiers contrary to law.

6. By causing several good subjects, being protestants, to be disarmed, at the same time when papists were both armed and employed, contrary to law.

Then, in a roughly parallel list of thirteen "ancient rights and liberties," the Declaration stated:

6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law.

7. That the subjects which are protestants may have arms for their defence suitable to their conditions and as allowed by law.

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<sup>163</sup> See Malcolm, *To Keep and Bear Arms*, *supra* note 33, at 95–106; Schwoerer, *Declaration*, *supra* note 157, at 71–73, 75–76; see also *The Federalist No. 26*, at 166 (Alexander Hamilton); Marcus No. 4 (James Iredell) (1788), reprinted in 1 *Debate on the Constitution*, *supra* note 97, at 391; Mass. Ratif. Conv., *in id.* at 904 (remarks of Thomas Dawes, Jr., Jan. 24, 1788).

<sup>164</sup> The Bill of Rights is at 1 W. & M., 2d Sess., c. 2 (1689). Its first three sections, except for the initial preamble, consist of the Declaration, see Schwoerer, *Declaration*, *supra* note 157, at 295, App. 1 (reprinting Declaration), and it recounts the events of the Revolution. See also 1 W. & M., 1st Sess., c. 1, § 2 (1689) (noting presentation and acceptance of crown, and proclaiming Parliament to be regular from that date); *id.* c. 6 (establishing coronation oath); 1 William Blackstone, *Commentaries* \*128, \*152, \*211–16, \*245 (discussing events); *The Federalist No. 84*, at 578 (Alexander Hamilton) (similar).

<sup>165</sup> *The Federalist No. 26*, at 165–66. See Schwoerer, *Declaration*, *supra* note 157, at 289 (Americans greeted the revolution and Declaration "with enthusiasm").

This seventh article is most relevant here, and it set out a personal right. Neither this article nor the parallel sixth indictment ties possession of arms to service in the militia, which the Declaration never mentions. The sixth indictment instead indicates that being “armed” and being “employed” by the government are distinct—a distinction confirmed by the historical context, which, as we have explained, included subjects being disarmed *by* the militia. Furthermore, the right belonged to “subjects,” not to any government, and these subjects were allowed arms “for *their* defence.”<sup>166</sup>

Critics of the individual right view contend that the two concluding clauses of the seventh article—“suitable to their Conditions, and as allowed by Law”—so restricted the right that it was a dead letter. Among the restrictions to which these clauses referred was the Game Act, which literally, albeit likely not in practice, barred most subjects from owning firearms.<sup>167</sup> As Lois G. Schwoerer has argued: “English-men did not secure to ‘ordinary citizens’ the right to possess weapons. . . . Drafted by upper-class Protestants who had their own interests at heart, Article VII was a gun control measure.”<sup>168</sup> The Declaration, therefore, the argument goes, could have had little relevance to the right in the Second Amendment.

But this argument regarding the *scope* of the right does not speak to the question that we consider here, which is whether the English right was a right of individuals, a right of government, or a right specifically connected with military service to the government. On that question, the answer is clear. Schwoerer herself recognizes that many articles of the Declaration “guaranteed rights to the individual,” including the right “to bear arms (under certain restrictions).”<sup>169</sup> Class- and religion-based restrictions did not destroy the personal nature of the right, whatever its scope. The precedent for Americans was an individual right.

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<sup>166</sup> Similarly, the same Parliament enacted a law providing that a “papist or reputed papist” could “have or keep . . . such necessary weapons, as shall be allowed to him by order of the justices of the peace . . . for the defence of his house or person.” 1 W. & M., 1st Sess., c. 15, § 3 (1688) (emphasis added).

<sup>167</sup> See Malcolm, *To Keep and Bear Arms*, *supra* note 33, at 86–89 (noting effect of wealth qualification but also dearth of prosecutions merely for possession). Blackstone complained that there was “fifty times the property required to enable a man to kill a partridge, as to vote for a knight of the shire.” 4 William Blackstone, *Commentaries* \*175. In addition, these clauses probably referred to two statutes from the 1540s restricting ownership and use of short handguns based on wealth, outlawing shot, and regulating the use of guns in cities or towns, see 33 Hen. VIII, c. 6 (1541); 2 & 3 Edw. VI, c. 14 (1548), and they may also have referred to the Militia Act, see Malcolm, *To Keep and Bear Arms*, *supra* note 33, at 120.

<sup>168</sup> Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 Chi.-Kent L. Rev. 27, 59 (2000). She seems to misunderstand the individual right view as requiring an unlimited right. See *id.* at 56, 60.

<sup>169</sup> Schwoerer, *Declaration*, *supra* note 157, at 283; see Malcolm, *To Keep and Bear Arms*, *supra* note 33, at 119–20. See also 2 De Lolme, *English Constitution*, *supra* note 139, at 886 (Declaration “expressly ensured to individuals the right of [petition and] of being provided with arms for their own defence”).

In addition, that Article 7 of the Declaration (and the Bill) only recognized a right to possess arms “as allowed by Law” does not mean that it did not secure a true right. In England’s constitutional tradition, particularly evident in the events surrounding the Declaration of Rights described above, formal English rights restricted only the Crown’s prerogative, not the legislature’s power, which was unrestricted. Thus, although Blackstone was able to explain many years after the English Revolution that a royal proclamation “for disarming any protestant subjects, will not bind,”<sup>170</sup> the right to arms, like all other English rights, remained subject to revision or abolition by Parliament.<sup>171</sup> That characteristic of English rights hardly prevented Americans from borrowing and adapting them to a different constitutional structure.

Finally, whatever the actual ability of ordinary English subjects to have arms for their defense in 1689, by the Founding, a hundred years later, the right to do so extended to most of the country. As Judge Kleinfeld of the Ninth Circuit recently observed, “[t]he historical context of the Second Amendment is a long struggle by the English citizenry to enable common people to possess firearms.”<sup>172</sup> In new game laws, particularly that of 1706, Parliament deleted guns from the list of implements that those not qualified to hunt game were prohibited from owning.<sup>173</sup> The courts determined that Parliament had made this deletion “purposely.”<sup>174</sup> Thus, notwithstanding the list’s catch-all prohibition of “any other engines,” they interpreted the deletion—together with the existence of “divers . . . lawful purposes” for which one might keep a gun, such as “for the defence of his house and family”—as protecting the right of individuals to keep guns even if they were not qualified to hunt game, so long as they did not hunt with them.<sup>175</sup> This

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<sup>170</sup> 1 William Blackstone, *Commentaries* \*271.

<sup>171</sup> See *The Federalist No. 84*, at 578–79 (Alexander Hamilton) (arguing “that bills of rights are in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, reservations of rights not surrendered to the prince,” and “[s]uch . . . was the declaration of rights presented by the lords and commons to the prince of Orange in 1688, and afterwards thrown into the form of an act of parliament called the bill of rights”).

<sup>172</sup> *Silveira*, 328 F.3d at 582 (Kleinfeld, J., joined by Kozinski, O’Scannlain, and T.G. Nelson, JJ., dissenting from denial of rehearing en banc).

<sup>173</sup> 5 Ann., c. 14, § 3 (1706); see 4 & 5 W. & M., c. 23, § 3 (1693) (similar). Parliament also repealed the later of the two statutes of the 1540s mentioned in note 167, noting its desuetude. 6 & 7 Will. III, c. 13, § 3 (1695). Enforcement of the other was, at least in the 1600s, lax and selective. See Malcolm, *To Keep and Bear Arms*, *supra* note 33, at 80–81, 87. Efforts to revise the Militia Act failed, but the right in the Bill may have sufficed to restrain the King from disarming Protestants. See *id.* at 123–25; see also 1 William Blackstone, *Commentaries* \*271; Schwoerer, *Declaration*, *supra* note 157, at 75–78, 267, 283.

<sup>174</sup> *Rex v. Gardner*, 87 Eng. Rep. 1240, 1241, 7 Mod. Rep. 279 (K.B. 1739).

<sup>175</sup> *Wingfield v. Stratford*, 96 Eng. Rep. 787, 787–88, Sayer Rep. 15 (K.B. 1752) (Lee, C.J., citing *Rex v. Gardner*, 2 Strange Rep. 1098 (K.B. 1738)); *Mallock v. Eastly*, 87 Eng. Rep. 1370, 1374, 7 Mod. Rep. 482 (C.P. 1744), respectively; see also Part II.B.1 (discussing use of “keep” in these and other cases); Malcolm, *To Keep and Bear Arms*, *supra* note 33, at 128 (quoting commentator of early 1800s reaffirming rule of these cases). In addition, it appears that courts strictly interpreted indictments

interpretation of the 1706 game act was considered “settled and determined” by 1744, and in 1752 the Chief Justice of the King’s Bench reaffirmed that it was “not to be imagined” that Parliament in that act had intended “to disarm all the people of England.”<sup>176</sup> By 1780, London’s Recorder—the city’s legal adviser and the primary judge of its criminal court—in an opinion supporting the legality of the city’s private armed associations formed for self-defense against riots, could announce as “most clear and undeniable” the “right of his majesty’s Protestant subjects, to have arms for their own defence, and to use them for lawful purposes,” adding that “this right, which every Protestant most unquestionably possesses individually,” also “may, and in many cases must, be exercised collectively,” subject to certain restrictions.<sup>177</sup> Similarly, an English commentator in the early 1790s wrote that “every one is at liberty to keep or carry a gun, if he does not use it for the destruction of game.”<sup>178</sup>

Blackstone’s *Commentaries*, first published in 1765–1769, were for the colonists and the Founding Generation the leading exposition of England’s laws and constitution. In them, he confirmed that the English right to arms was an individual one and explained that it had grounds broader and deeper than the right that had been declared in the Revolution of 1688–1689.

In the first chapter of the first book, Blackstone detailed the “absolute rights of individuals,”<sup>179</sup> that is, “such as appertain and belong to particular men, merely as individuals or single persons” and which “every man is entitled to enjoy, whether out of society or in it.”<sup>180</sup> It was the purpose of law “to maintain and regulate”

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under the game laws. See *King v. Silcot*, 87 Eng. Rep. 186, 186 n.(b), 3 Mod. Rep. 280 (K.B. 1690) (reporter’s note from 1793).

<sup>176</sup> *Mallock*, 87 Eng. Rep. at 1374; *Wingfield*, 96 Eng. Rep. at 787 (Lee, C.J.).

<sup>177</sup> Legality of the London Military Foot-Association, *supra* note 64, at 59–60 (italics omitted). For background, see Part II.B.2 above. The Recorder found it “a matter of some difficulty to define the precise limits and extent of the rights of the people of this realm to bear arms, and to instruct themselves in the use of them, *collectively*.” *Id.* at 59. At the very least, he opined, such a group needed to (1) have a “lawful” “professed purpose and object,” (2) “demean themselves in a peaceable and orderly manner” consistent with that purpose, (3) not assemble in numbers that “manifestly and greatly exceed” that purpose; and (4) not “act without the authority of the civil magistrate” except to suppress “sudden, violent, and felonious breaches of the peace.” *Id.* at 62 (italics omitted). See also 1 William Hawkins, *A Treatise on the Pleas of the Crown* ch. 63, § 10, at 136 (1724; reprint 1972) (noting legality of person “arm[ing] himself to suppress dangerous Rioters, Rebels, or Enemies” and “endeavour[ing] to suppress or resist such Disturbers of the Peace or Quiet of the Realm”); *id.* ch. 65, § 21, at 161 (noting right to do so when assisting Justice of Peace against riot).

<sup>178</sup> See William Blackstone, 2 *Commentaries on the Laws of England* \*412 n.8 (William Draper Lewis ed., 1900) (reprinting annotation of Edward Christian). Christian’s posthumous Blackstone was published in 1793–95, see Malcolm, *To Keep and Bear Arms*, *supra* note 33, at 134, 210, and available in America, see 1 Tucker’s Blackstone, *supra* note 60, at \*145 n.42. Although the law was clear, some questioned how much as a practical matter the revision of the game laws had benefited commoners, as we explain in the discussion of the Pennsylvania Constitution below in Part III.B.2.

<sup>179</sup> 1 William Blackstone, *Commentaries* \*121; *id.* at \*123, 124.

<sup>180</sup> *Id.* at \*123. He contrasted “relative” individual rights, “which are incident to [persons] as members of society, and standing in various relations to each other.” *Id.*

these rights in society, but “wanton and causeless restraint” was “a degree of tyranny.”<sup>181</sup> He delineated three “principal or primary . . . rights of the people of England”: “the right of personal security, the right of personal liberty, and the right of private property.”<sup>182</sup>

But Blackstone recognized that declaring these three primary rights would be “in vain” and a “dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment.” He therefore identified five “auxiliary subordinate rights of the subject”—“outworks or barriers to protect and maintain” the principal rights.<sup>183</sup> The first two were maintaining the constitution of Parliament and clear limits on the King’s prerogative. Because these were more properly issues of governmental structure, he postponed their discussion to later chapters.<sup>184</sup> The other three, however, were plainly individual rights: (a) the “right of every Englishman . . . of applying to the courts of justice for redress of injuries”; (b) the “right, appertaining to every individual . . . of petitioning the king, or either house of parliament, for the redress of grievances,” so long as no “riot or tumult” resulted; and (c) the “right of the subject . . . of having arms for their defence suitable to their condition and degree, and such as are allowed by law.” He noted that the latter two rights both had been recognized in the 1689 Bill of Rights.<sup>185</sup>

Blackstone explained the subject’s right of having arms as “a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.”<sup>186</sup> By tying the right to the natural—and thus individual and pre-political—right of self-defense, he recognized a deeper foundation than its declaration and enactment in 1689 and confirmed that the right existed independently of any bearing of arms in service to the militia, a subject that he did not mention in connection with the right.<sup>187</sup>

He returned to the right in concluding the first chapter. Again grouping together the last three auxiliary rights (suing, petitioning, and having arms), he explained that all were means for “the subjects of England” to “vindicate” the three primary rights “when actually violated or attacked.” Thus, subjects were “entitled . . . to

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<sup>181</sup> *Id.* at \*124–28.

<sup>182</sup> *Id.* at \*129. These reappear throughout the American Constitution, in general protections against deprivations of “life, liberty, or property, without due process of law” and in specific rights. See, for example, St. George Tucker’s footnotes annotating Blackstone’s exposition of the three principal rights with parallels in the Constitution, 2 Tucker’s Blackstone, *supra* note 60, at \*129, \*133–40.

<sup>183</sup> 1 William Blackstone, *Commentaries* \*140–41.

<sup>184</sup> *See id.* at \*141.

<sup>185</sup> *Id.* at \*141, \*143–44.

<sup>186</sup> *Id.* at \*144.

<sup>187</sup> *See also* 4 *id.* at \*55–58 (elsewhere describing prohibitions against certain Roman Catholics keeping arms as hopefully temporary suspensions of rights). He summarized the militia in Chapter 13, 1 *id.* at \*412–13.

the right of having and using arms for self-preservation and defence.”<sup>188</sup> By his repeated reference to “self-preservation” and his description of the right as including both “having and *using*” arms, Blackstone reiterated that the right had a personal aspect and was linked to self-defense—to the right to use one’s “limbs . . . to protect himself from external injuries,” which was part of the individual right of personal security.<sup>189</sup>

Finally, Blackstone’s view of the right as belonging to individuals re-appears in his repeated disparagement of game laws as a pretext to undermine commoners’ ability to use or have arms. He traced them to “slavery” imposed after the fall of the Roman Empire by invading generals, who sought to “keep the *rustici* or natives . . . in as low a condition as possible, and especially to prohibit them the use of arms.” Thus, “we find, in the feudal constitutions, one and the same law prohibiting the *rustici* in general from carrying arms, and also proscribing the use of nets, snares, or other engines for destroying the game.”<sup>190</sup> He denounced those arising in England after the Norman Conquest of 1066 as a “tyranny to the commons,”<sup>191</sup> and thought their real rationale was an aristocratic desire to “dis-arm[] the bulk of the people.”<sup>192</sup> He briefly described England’s existing criminal game laws as confused and having a “questionable” nature, their “rational footing” being elusive.<sup>193</sup> But he approved hunting restrictions against trespassing<sup>194</sup> and did not criticize several other restrictions on the use and carrying of arms, involving breaches of the peace.<sup>195</sup>

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<sup>188</sup> 1 *id.* at \*144.

<sup>189</sup> *Id.* at \*130. *See id.* at \*134 (summarizing common law’s special protection for “those limbs and members that may be necessary to a man in order to defend himself or annoy his enemy”).

<sup>190</sup> 2 *id.* at \*412, 413.

<sup>191</sup> 4 *id.* at \*416; *see* 2 *id.* at \*415–16 (forest laws produced “the most horrid tyrannies and oppressions”).

<sup>192</sup> 2 *id.* at \*412. As an example, he cited a popular book, by a bishop (and thus lord), that praised banning “Peasants and Mechanics” from hunting game: “It was not at all for the *public Good* to suffer [them] . . . to run up and down the Woods and Forests, armed; which . . . draws them on to Robbery and Brigandage: Nor to permit the populace, in Towns and Cities, to have, and carry *Arms* at their pleasure; which would give opportunity and encouragement to Sedition, and Commotions.” 1 William Warburton, *The Alliance Between Church and State: Or, the Necessity and Equity of An Established Religion and a Test Law Demonstrated* 324 (London 4th ed. 1766).

<sup>193</sup> 4 William Blackstone, *Commentaries* \*174–75.

<sup>194</sup> *See* 2 *id.* at \*411–12 (approving as “natural” a ban on unauthorized hunting on private property); *see* 4 *id.* at \*174 (being less critical of the “forest law,” which simply prohibited hunting in the king’s forests).

<sup>195</sup> *See* 4 *id.* at \*144 (unlawful hunting—being disguised and “armed with offensive weapons” in breach of peace and to terror of public); *id.* at \*145 (affray (public fighting), including attack with or drawing of weapon on church grounds); *id.* at \*148 (forcible entry or detainer, “such as is carried on and maintained with force, with violence, and unusual weapons”); *id.* at \*149 (“*riding or going armed*, with dangerous or unusual weapons . . . by terrifying” the people); *see also id.* at \*146–47 (riots, routs, unlawful assemblies, and tumultuous petitioning); *id.* at \*168 (quasi-nuisance of “making, keeping, or carriage, of too large a quantity of *gunpowder* at one time or in one place or vehicle”); *cf. id.* at \*182 (excusable homicide by misadventure, such as “where a person qualified to keep a gun is shooting at a

Thus, the right to arms that America inherited from England was a right of individuals, and had deep roots by the time of the Framing. It did not depend on service in the government's militia, nor was it a federalism-related "right" of any government. It therefore provides no warrant for a quasi-collective right or collective right view of the Second Amendment. And, absent any evidence that Americans wished to abridge this individual right or transform it substantially, a question that we consider next, the English precedent supports an individual right view of that Amendment.

## **B. The Right in America Before the Framing**

The English colonists in America recognized this right of individual subjects to have and use arms, and they retained it as they broke from the mother country. They also recognized that it furthered the citizen militia to which they looked as a security for their freedom. These related ideas of an individual right to arms and regard for the citizen militia formed the backdrop for the Second Amendment. We first consider the history of the American Revolution and then review the states' first constitutions, written during that war.

### **1. The Experience of the Revolution**

As the Revolution approached and conflicts with royal authorities rose, colonial leaders both reaffirmed the individual right to arms inherited from England and praised the shared duty of being armed imposed by local law. The colonial militias were broad-based, composed of all able-bodied white men, who were expected to be armed with the private weapons that all households were required to keep (regardless of eligibility for militia duty), there being a "general obligation of all adult male inhabitants to possess arms, and, with certain exceptions, to cooperate in the work of defense."<sup>196</sup> Citizens sometimes were required not only to own

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mark and undesignedly kills a man: for the act is lawful, and the effect is merely accidental"); 3 *id.* at \*4 (noting limitation of self-defense to "resistance" that "does not exceed the bounds of mere defence and prevention").

<sup>196</sup> *United States v. Miller*, 307 U.S. 174, 179–80 (1939) (internal quotation marks omitted). See Kates, *supra* note 33, 82 Mich. L. Rev. at 215–16 ("With slight variations, the different colonies imposed a duty to keep arms and to muster occasionally for drill upon virtually every able-bodied white man between the age of majority and a designated cut-off age. Moreover, the duty to keep arms applied to *every* household, not just to those containing persons subject to militia service. Thus, the over-aged and seamen, who were exempt from militia service, were required to keep arms for law enforcement and for the defense of their homes from criminals or foreign enemies.") (footnotes omitted). In Virginia, "Every able-bodied freeman, between the ages of 16 and 50, is enrolled in the militia. . . . The law requires every militia-man to provide himself with the arms usual in the regular service." That requirement "was always indifferently complied with," and the militia's arms were "frequently called for to arm the regulars," so that "in the lower parts of the country they are entirely disarmed." But "[i]n the middle country a fourth or fifth part of them may have such firelocks as they had provided to destroy the noxious animals which infest their farms; and on the western side of the

weapons but also to carry them, and the class-based distinctions of England generally did not apply.<sup>197</sup> America had its own set of distinctions, based on race, but even free blacks were often allowed to possess arms as individuals, even though usually barred from militia service.<sup>198</sup>

Boston was the focus of early opposition to Britain, and its leaders invoked both the individual right to arms (as secured by the 1689 Bill of Rights and also as expounded by Blackstone) and the local duty of being armed. A 1768 town meeting led by Samuel Adams, John Hancock, and others resolved that the right enacted in the English Bill of Rights was “founded in Nature, Reason and sound Policy, and is well adapted for the necessary Defence of the Community,” while also praising the colony’s law requiring “every listed Soldier and other Householder” to be armed. The resolution thus requested that any Bostonian lacking arms “duly . . . observe the said Law.”<sup>199</sup> Boston newspapers defended the meeting’s actions:

[I]t is certainly beyond human art and sophistry, to prove the British subjects, to whom the *privilege* of possessing arms is expressly recognized by the Bill of Rights, and, who live in a province where the law requires them to be equip’d with *arms*, &c. are guilty of an *illegal act*, in calling upon one another to be provided with them, as the *law directs*.<sup>200</sup>

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Blue [R]idge they are generally armed with rifles.” Jefferson, *Notes*, *supra* note 56, at 88. For more regarding the militia, see Part II.C.2–4 above.

<sup>197</sup> See Malcolm, *To Keep and Bear Arms*, *supra* note 33, at 139 (quoting colonial statutes from Rhode Island, Virginia, and Georgia); Kates, *supra* note 33, 82 Mich. L. Rev. at 216 (discussing Georgia law); *id.* at 240 (“the English Game Acts . . . had never been a part of the colonial law”); 5 Tucker’s Blackstone, *supra* note 60, at \*175 n.16 (describing game laws of Virginia, limited to prohibiting trespass and conversion and establishing hunting season for deer).

<sup>198</sup> See Cottrol & Diamond, *supra* note 33, 80 Geo. L.J. at 323–27 (noting that “the traditional English right” became “a much broader American one” as part of “a more general lessening of class, religious, and ethnic distinctions among whites in colonial America,” but that “the law was much more ambivalent with respect to blacks”; surveying varying colonial laws regarding right of blacks to carry weapons or keep them in their homes, and noting usual exclusion from militia duty, except in “times of crisis”); Malcolm, *To Keep and Bear Arms*, *supra* note 33, at 140–41 (“The second group [after Indians] forbidden to possess weapons were black slaves, with restrictions sometimes extended to free blacks . . . Northern colonies were ambivalent about blacks possessing firearms”; surveying colonial laws and drawing parallel to England’s ambivalent treatment of right of Roman Catholics to have arms).

<sup>199</sup> Boston Chron., Sept. 19, 1768, at 363, col. 2, *quoted in* Halbrook, *Right to Bear Arms*, *supra* note 56, at 1–2. This resolution was republished in the *Maryland Gazette*. See *id.* at 61.

<sup>200</sup> Bos. Gazette, and Country J., Jan. 30, 1769, at 2, col. 1, *quoted in* Halbrook, *Right to Bear Arms*, *supra* note 56, at 6; see Boston Under Military Rule, 1768–1769, as Revealed in a Journal of the Times 61 (Oliver Morton Dickerson ed., 1936) (reprinting same passage from Boston Evening Post, Apr. 3, 1769).

A subsequent article by Adams recounted the English Revolution and then quoted both of Blackstone's primary discussions of the right to arms. Adams attacked critics of the "late vote of this town, calling upon the inhabitants to *provide themselves with arms for their defence*," as insufficiently "attend[ing] to the rights of the constitution."<sup>201</sup> The *New York Journal Supplement* reiterated this argument:

It is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defence; and as Mr. Blackstone observes, it is to be made use of when the sanctions of society and law are found insufficient to restrain the violence of oppression.<sup>202</sup>

The individual's right to have and use arms for self-defense was reaffirmed in the celebrated "Boston Massacre" murder trial, in 1770, of British soldiers for firing on a harassing crowd. (Soldiers had been garrisoned in Boston since late 1768.) John Adams, counsel for the soldiers, argued that they had acted in self-defense. In his closing argument, he quoted William Hawkins's *Treatise on the Pleas of the Crown* to establish that "'every private person seems to be authorized by the law, to arm himself'" to defend against dangerous rioters. Adams added: "Here every private person is authorized to arm himself, and on the strength of this authority, I do not deny the inhabitants had a right to arm themselves at that time, for their defence . . ." <sup>203</sup> Adams reiterated that view in his 1787 *Defence of the Constitutions of Government of the United States of America*, recognizing the propriety of "arms in the hands of citizens, to be used . . . in private self-defence."<sup>204</sup>

British authorities, much like Charles II and James II a century before, moved to disarm the colonists as hostilities mounted in 1774. Britain banned the export of arms and ammunition to any of the colonies and ordered General Gage to consider how to disarm residents of rebellious areas. At least in Massachusetts, some disarmament occurred, and in the "Powder Alarm" of September 1, 1774, British

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<sup>201</sup> Samuel Adams, Boston Gazette, Feb. 27, 1769, reprinted in 1 *Founders' Constitution*, note 118, at 90. Adams quoted 1 William Blackstone, *Commentaries* \*143–44 & \*144.

<sup>202</sup> *Boston, March 17*, N.Y.J. Supp., Apr. 13, 1769, at 1, col. 3, reprinted in *Boston Under Military Rule* at 79; see Halbrook, *Right to Bear Arms*, *supra* note 56, at 7 (quoting same passage).

<sup>203</sup> 3 *Legal Papers of John Adams* 248 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) (quoting "Hawkins p. 71, § 14"). For the facts, see *id.* at 1 (note). Adams secured several acquittals. *Id.* at 29.

<sup>204</sup> 3 John Adams, *A Defence of the Constitutions of Government of the United States of America* 475 (1787). The Ninth Circuit selectively quoted this sentence to claim that Adams "ridiculed . . . an individual right to personal arms" and asserted that "the general availability of arms" would "'demolish every constitution, and lay the laws prostrate, so that liberty can be enjoyed by no man—it is a dissolution of the government.'" *Silveira*, 312 F.3d at 1085. In these portions, Adams was merely arguing against command of the militia by private persons or localities, while also expressly reiterating the right of arming for private self-defense.

soldiers seized ammunition belonging to the colonial militia.<sup>205</sup> These actions stiffened resistance throughout the colonies<sup>206</sup> and led the colonists to form independent local militias with broad membership, the “Minutemen.”<sup>207</sup> Gage’s attempts in late 1774 and early 1775 to seize these groups’ arms across Massachusetts provoked confrontations with large forces of armed colonists, and the Revolution was famously ignited by his efforts to do so at Concord and Lexington in April 1775.<sup>208</sup> Virginia Governor Dunmore’s raid on an ammunition store in Williamsburg soon thereafter prompted a similar response, as militiamen surrounded his home.<sup>209</sup> British authorities’ continuing efforts to disarm colonists were among the actions that the Continental Congress cited when, in July 1775, it declared the colonies’ reasons for taking up arms.<sup>210</sup>

As the colonists armed and organized themselves, their leaders continued to turn to their rights as British subjects and praised the citizen militias that these rights made possible. George Mason’s actions in Virginia (in conjunction with George Washington and others) provide an example. In September 1774, he chaired a meeting of Fairfax County citizens to form a private militia association known as the Fairfax Independent Company. Being “threat’ned with the Destruction of our Civil-rights, & Liberty, and all that is dear to British Subjects & Freemen,” members promised to keep themselves well armed and to train together under elected officers.<sup>211</sup> The following January, in a document attributed to Mason, the county’s Committee of Safety recommended a tax to purchase ammunition, resolved that “a well regulated Militia, composed of gentlemen freeholders, and other freemen, is the natural strength and only stable security of a

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<sup>205</sup> See Hardy, *supra* note 33, 9 Harv. J.L. & Pub. Pol’y at 590; Halbrook, *Right to Bear Arms*, *supra* note 56, at 9, 16, 72. Soldiers seized provincial armories in Cambridge and Charlestown. In response, “twenty thousand Yankees picked up their muskets and headed for Boston” to confront the British. Robert A. Gross, *The Minutemen and Their World* 55 (1976).

<sup>206</sup> See First Continental Congress, Appeal to the Inhabitants of Quebec (Oct. 1774), *reprinted in 1 American Political Writing During the Founding Era, 1760–1805*, at 237 (Charles S. Hyneman & Donald S. Lutz eds., 1983) (“The injuries of Boston have roused and associated every colony.”); Halbrook, *Right to Bear Arms*, *supra* note 56, at 88–89 (quoting warning of South Carolina’s governing body in 1774 against British “design of disarming the people of America” through the embargo).

<sup>207</sup> See Gross, *Minutemen*, *supra* note 205, at 59. In Concord, “Minutemen trained twice a week on the common and carried their muskets everywhere, in the fields, in shops, even in church.” When they were mustered in March 1775, it “presented a revealing portrait of the community. This was a citizen army of rural neighbors. . . . The Concord militia included nearly everyone between the ages of sixteen and sixty.” *Id.* at 69–70.

<sup>208</sup> Hardy, *supra* note 33, 9 Harv. J.L. & Pub. Pol’y at 590–91; Malcolm, *To Keep and Bear Arms*, *supra* note 33, at 145–46.

<sup>209</sup> Hardy, *supra* note 33, 9 Harv. J.L. & Pub. Pol’y at 592; Halbrook, *Right to Bear Arms*, *supra* note 56, at 16.

<sup>210</sup> 1 *Journals of Congress* 137 (July 6, 1775) (1800); see Halbrook, *Right to Bear Arms*, *supra* note 56, at 13–15; Hardy, *supra* note 33, 9 Harv. J.L. & Pub. Pol’y at 591.

<sup>211</sup> 1 *Mason Papers*, *supra* note 56, at 210–11.

free Government,” and urged residents “from sixteen to fifty years of age” to choose officers, “provide themselves with good Firelocks,” and train.<sup>212</sup> In April 1775, Mason addressed the Company and praised it as formed “for the great and useful purposes of defending our country, and preserving those inestimable rights which we inherit from our ancestors.” In a time of “threatened . . . ruin of that constitution under which we were born,” it was a security “that in case of absolute necessity, the people might be the better enabled to act in defence of their invaded liberty.”<sup>213</sup>

Similar sentiments appeared in North Carolina. Soon after Lexington and Concord, the royal Governor denounced those urging people “to be prepared with Arms” and train under committees of safety.<sup>214</sup> But in July 1775, North Carolina’s delegates to the Continental Congress urged the committees to “form yourselves into a Militia” in the exercise of “the Right of every *English* Subject to be prepared with Weapons for his Defense.”<sup>215</sup>

In October 1775, Britain declared the colonies in rebellion,<sup>216</sup> but organizational efforts continued. John Adams, in his *Thoughts on Government* written in early 1776 in response to requests for advice, recommended a “Militia Law requiring all men, or with very few exceptions, besides cases of conscience, to be provided with arms and ammunition, to be trained at certain seasons.” Such a law would be “always a wise institution” but was “in the present circumstances of our country indispensable.”<sup>217</sup>

Many lauded the citizen militias that fought in the Revolution. American General Nathanael Greene, writing to Thomas Jefferson, remarked on the “Enterprize and Spirit” of “this Great Bulwark of Civil Liberty [that] promises Security and Independence to this Country.”<sup>218</sup> Americans credited crucial early victories to the citizen militias, even while recognizing their limitations.<sup>219</sup> Well after the war,

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<sup>212</sup> *Id.* at 212.

<sup>213</sup> *Id.* at 229–31.

<sup>214</sup> See Halbrook, *Right to Bear Arms*, *supra* note 56, at 29–30.

<sup>215</sup> Richard Caswell, William Hooper, & Joseph Hewes, *To the Committees of the Several Towns and Counties of the Province of North Carolina*, N.C. Gazette (Newburn), July 7, 1775, at 2, col. 3, excerpted in Halbrook, *Right to Bear Arms*, *supra* note 56, at 29.

<sup>216</sup> See 4 *Papers of John Adams* 78 n.6 (Robert J. Taylor ed., 1979) (editorial note).

<sup>217</sup> John Adams, *Thoughts on Government* (Apr. 1776), reprinted in 4 *id.* at 91. This pamphlet, written for political leaders in North Carolina, Virginia, and New Jersey, was widely reprinted and discussed for several years. See *id.* at 65, 68–72 (editorial note).

<sup>218</sup> Letter from Greene to Jefferson (Nov. 20, 1780), in 4 *Jefferson Papers*, *supra* note 62, at 130–31.

<sup>219</sup> See, e.g., A Democratic Federalist, Penn. Herald, Oct. 17, 1787, reprinted in 2 *Ratification*, *supra* note 67, at 197 (arguing that “a well-regulated militia” is “sufficient for every purpose of internal defense,” as shown by victories at Lexington and Bunker Hill); Va. Ratif. Conv., in 9 *Ratification*, *supra* note 67, at 981 (remarks of Edmund Randolph, June 6, 1788) (“I will pay the last tribute of gratitude to the militia of my country: They performed some of the most gallant feats during the last war, and acted as nobly as men enured to other avocations could be expected to do: But, Sir, it is

James Madison could argue in *The Federalist* that an oppressive army would be no match for citizen militias, as “[t]hose who are best acquainted with the late successful resistance of this country against the British arms” would recognize. He also pointed to “the advantage of being armed, which the Americans possess over the people of almost every other nation,” governments in most of the world being “afraid to trust the people with arms.”<sup>220</sup>

## 2. Early Constitutional Recognition of the Right

One product of this experience of the American Revolution was that several states included explicit right to bear arms provisions in declarations of rights that they adopted during the war. These appeared in Pennsylvania, North Carolina, Vermont, and Massachusetts. In the identical provisions of Pennsylvania and Vermont, the language plainly reaffirmed the established right of individuals to arm themselves for self-defense. In the provisions of North Carolina and Massachusetts, although the express scope of the right may have been narrower, the right still belonged to individuals—these state provisions could not have been intended to protect the states’ prerogatives, nor did they restrict the right to participants in militia units. Other states, most notably Virginia, did not include any provision regarding the right to bear arms in their declarations but did praise “a well regulated Militia.”<sup>221</sup>

*Virginia.* Virginia’s Declaration of Rights, adopted a month before the Declaration of Independence, was the country’s first. Section 13 provided:

That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State: that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.<sup>222</sup>

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dangerous to look to them as our sole protectors.”); *The Federalist No. 25*, at 161–62 (Alexander Hamilton) (praising militias’ valor but emphasizing insufficiency for defense). General Greene recognized that the militia should “not [be] depended upon as a principal but employed as an Auxilliary.” Letter to Jefferson, *reprinted in 4 Jefferson Papers*, *supra* note 62, at 131.

<sup>220</sup> *The Federalist No. 46*, at 321–22.

<sup>221</sup> The first constitutions of New Jersey, South Carolina, Georgia, and New York did not include separate bills of rights. Their constitutions did protect a few rights, but did not include the right to arms or general statements regarding the militia. *See* 1 Schwartz, *Bill of Rights*, *supra* note 67, at 256 (N.J. 1776); *id.* at 291 (Ga. 1777); *id.* at 301 (N.Y. 1777); *id.* at 325 (S.C. 1778). Georgia did provide for forming a militia battalion in any county with “two hundred and fifty men, and upwards, liable to bear arms,” *id.* at 297, and New York declared the duty of all to provide personal service to protect society, *see id.* at 312, much as the Pennsylvania Declaration, discussed below, did. Connecticut and Rhode Island did not adopt new constitutions. *Id.* at 289.

<sup>222</sup> Va. Bill of Rights § 13 (1776), *reprinted in 7 Federal and State Constitutions*, *supra* note 78, at 3814.

This provision expressly recognizes the background definition of “militia” explained in Part II.C: It was not a specialized or select force, but rather a force of the people. Such an understanding of the militia is consistent with the right of individuals to have arms—particularly given that, as we have explained, the citizen militia was supposed to be “trained to” its members’ private arms.<sup>223</sup> Significantly, the provision’s primary author was George Mason,<sup>224</sup> whose public views have already been noted and who would play a leading role twelve years later, explained below, in authoring the proposal of Virginia’s ratifying convention that placed together in a single article the individual right and this praise of the citizen militia.<sup>225</sup>

**Pennsylvania.** Pennsylvania adopted its Declaration of Rights in September 1776. Article 13, immediately following an article providing “[t]hat the people have a right to freedom of speech,” read:

That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.<sup>226</sup>

While following the same structure as Virginia’s (of which the convention members were well aware<sup>227</sup>), this article replaced the praise of the well-regulated citizen militia with a right—a right of “the people,” who, just as they had an individual right to speak, also had an individual right to “bear arms,” for either of the dual purposes of defending “themselves and the state.” The article does not restrict the right to those in militia service, which it does not mention and which Pennsylvania addressed separately: Article 8 broadly provided that “every member of society,” receiving protection from it, was bound to contribute money and “his

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<sup>223</sup> Regarding this point and the meaning of both “militia” and “well regulated militia,” see above Parts II.C.2–4 and III.B.1, at note 196 (quoting Jefferson’s *Notes on the State of Virginia*, *supra* note 56).

<sup>224</sup> See 1 *Mason Papers*, *supra* note 56, at 274–75, 286 (editorial notes); *id.* at 287 (final draft).

<sup>225</sup> Delaware, Maryland, and New Hampshire adapted Virginia’s language, omitting definition of the militia and changing “free state” to “free government” while retaining the implicit connection between “a well regulated militia” and the avoidance of standing armies and military insubordination. See Del. Decl. of Rights §§ 18–20 (1776), *reprinted in 5 Founders’ Constitution*, note 118, at 5, 6; Md. Decl. of Rights §§ 25–27 (1776), *reprinted in 3 Federal and State Constitutions*, *supra* note 78, at 1688; N.H. Const. pt. I, arts. 24–26 (1784), *reprinted in 4 Federal and State Constitutions*, *supra* note 78, at 2456. The Delaware Constitution also specially provided that “[t]o prevent any violence or force being used at . . . elections, no person shall come armed to any of them, and no muster of the militia shall be made on that day.” Del. Const. art. XXVIII (1776), *reprinted in 1 Federal and State Constitutions*, *supra* note 78, at 567.

<sup>226</sup> *Reprinted in 5 Federal and State Constitutions*, *supra* note 78, at 3083.

<sup>227</sup> See 1 *Mason Papers*, *supra* note 56, at 276 (note discussing “the widespread and almost immediate influence of the Virginia Declaration of Rights on other nascent states,” including Pennsylvania).

personal service when necessary,” while allowing an exception for anyone “conscientiously scrupulous of bearing arms, . . . if he will pay [an] equivalent.”<sup>228</sup> And the plan of government, adopted concurrently, provided for a militia of “[t]he freemen of this commonwealth and their sons.”<sup>229</sup>

The plan of government also provided that persons could use their arms to hunt (without trespassing): “The inhabitants of this state shall have liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not inclosed.”<sup>230</sup> Regardless of the relevance of this provision to the contours of the right to bear arms (a question beyond the scope of this memorandum), the provision does seem to have been viewed as a practical security for, and thus a way of emphasizing the importance of, the right of individuals that Pennsylvania had elsewhere secured. The view that the English game laws—which had provided for disarming many in the name of the hunting privileges of a few—had been a pretext for undermining the right in practice was prevalent at the time. Thomas Paine had criticized the game laws in the *Pennsylvania Magazine* the year before Pennsylvania adopted its constitution, and one newspaper article, although recognizing that the newer game acts did not prohibit merely keeping a gun, argued that English aristocrats still used them to disarm commoners, by procuring witnesses to claim that defendants had used their arms for hunting.<sup>231</sup>

Pennsylvania held another convention from November 1789 through September 1790, as the Second Amendment was before the states for ratification. The resulting constitution retained essentially the same individual right. Section 21 of the declaration of rights, immediately following a section providing “[t]hat the citizens have a right” to assemble and petition, provided:

That the right of the citizens to bear arms, in defence of themselves and the State, shall not be questioned.<sup>232</sup>

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<sup>228</sup> 5 *Federal and State Constitutions*, *supra* note 78, at 3083. Such personal service would be difficult if one could not own private arms. This duty may have been broader than the obligation of militia duty, perhaps including the posse comitatus. See generally *The Federalist No. 29*, at 182–83 (Alexander Hamilton). New Hampshire’s constitution, while praising the well-regulated militia, recognized this duty separately, N.H. Const. pt. I, arts. 12–13, *reprinted in* 4 *Federal and State Constitutions*, *supra* note 78, at 2455, although New York’s connected the two, N.Y. Const. § 40 (1777), *reprinted in* 5 *id.* at 2637.

<sup>229</sup> Pa. Plan or Frame of Gov’t § 5 (1776), *reprinted in* 5 *Federal and State Constitutions*, *supra* note 78, at 3084.

<sup>230</sup> *Id.* § 43, *reprinted in* 5 *Federal and State Constitutions*, *supra* note 78, at 3091.

<sup>231</sup> See Halbrook, *Right to Bear Arms*, *supra* note 56, at 23–25. Some in England shared this concern. See Schwoerer, *supra* note 168, 76 *Chi.-Kent L. Rev.* at 52–53.

<sup>232</sup> Pa. Const. art. IX, §§ 20 & 21, *reprinted in* 5 *Federal and State Constitutions*, *supra* note 78, at 3101. Section 22 addressed standing armies and civilian control of the military. Kentucky, admitted in 1791 as the fifteenth state, copied this language on the right verbatim. See Ky. Const. art. XII, § 23 (1792), *reprinted in* 3 *Federal and State Constitutions*, *supra* note 78, at 1275.

Separately, in the body of the constitution, the protection of conscientious objectors was combined with the provision relating to the citizen militia:

The freemen of this commonwealth shall be armed and disciplined for its defence. Those who conscientiously scruple to bear arms shall not be compelled to do so, but shall pay an equivalent for personal service. The militia officers shall be appointed in such manner and for such time as shall be directed by law.<sup>233</sup>

Thus, the *right* to “bear arms” remained with individual people, now “the citizens,” and existed for the dual purpose of facilitating the defense of individuals and the state. Neither purpose was expressly tied to, let alone limited to, service in the militia. And the *duty* of “freemen” to “bear arms,” including possible exemption from that duty, was distinct and was tied to the militia. In both the 1776 and 1790 Pennsylvania constitutions, “bear arms” could and did bear both meanings.

**North Carolina.** North Carolina adopted its constitution and declaration of rights in December 1776. Article 17 of the declaration provided:

That the people have a right to bear arms, for the defence of the State; and, as standing armies, in time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power.<sup>234</sup>

This article mentions only the right of the people to bear arms for “the defence of the State.” Regardless of the provision’s scope, however, the right still belonged to individuals, just as the immediately following Article 18 set out a right of individuals in providing “[t]hat the people have a right to assemble together,” and in contrast with Article 25’s declaration, in delineating the state’s boundaries, of “the essential rights of the collective body of the people” in the “property of the soil.”<sup>235</sup> It would not have made sense, in the context of a state constitution, for a “right” of “the people” to protect only the prerogatives of the state. And the provision’s text indicates that all of the people (not just those organized by the state into militia units) had a right to bear arms, at least in defense of the state. As an early North Carolina Supreme Court decision recognized, the right in Article 17 belonged “to every man indeed” and “secur[ed] to him a *right* of which he cannot

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<sup>233</sup> Pa. Const. art. VI, § 2, reprinted in *5 Federal and State Constitutions*, supra note 78, at 3099. Kentucky also copied this provision. See Ky. Const. art. VI, § 2, reprinted in *3 Federal and State Constitutions*, supra note 78, at 1271.

<sup>234</sup> Reprinted in *5 Federal and State Constitutions*, supra note 78, at 2788.

<sup>235</sup> *Id.*

be deprived,” to be exercised “for the safety and protection of his country.”<sup>236</sup> Moreover, by expressly protecting the right of the people to bear arms “for the defence of the State” (something that North Carolinians were then doing against the British), the drafters of the North Carolina Constitution do not appear to have intended to abrogate the arguably more modest individual English right.<sup>237</sup> Indeed, the president of the constitutional convention, who served on the committee that wrote the declaration, had been one of the three congressional delegates who the year before, as discussed above, had urged North Carolinians to exercise “the Right of every *English* Subject to be prepared with Weapons for his Defense.”<sup>238</sup>

**Vermont.** The Vermont constitution approved in July 1777 provided that “the people have a right to bear arms for the defence of themselves and the State,” in an article identical to Article 13 of Pennsylvania’s Declaration.<sup>239</sup> As in Pennsylvania, this individual right immediately followed the individual right of “the people . . . to freedom of speech,” and the constitution separately included a hunting guarantee, citizen militia provisions, and an exception for conscientious objectors.<sup>240</sup> All of these remained in Vermont’s 1786 and 1793 constitutions.<sup>241</sup>

**Massachusetts.** Article 17 of the Massachusetts Declaration of Rights of 1780 provided:

The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and

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<sup>236</sup> *State v. Huntly*, 25 N.C. (3 Ired.) 418, 1843 WL 891, at \*2. Another early decision recognized that the right of “free people of color” to bear arms might be abridged—but only because the court believed that they “cannot be considered as citizens,” or at least not full citizens, not because of any exclusion from the militia (a subject the court did not mention). *State v. Newsom*, 27 N.C. (5 Ired.) 250, 1844 WL 1059, at \*1, \*2.

<sup>237</sup> See below note 239.

<sup>238</sup> This was Richard Caswell, who became the first governor. Another member of the committee also had been one of the three delegates. See Halbrook, *Right to Bear Arms*, *supra* note 56, at 29–31; see also *5 Federal and State Constitutions*, *supra* note 78, at 2794.

<sup>239</sup> Vt. Const. ch. I, § 15, *reprinted in 6 Federal and State Constitutions*, *supra* note 78, at 3741. The constitution also asserted independence from New York. *Id.* at 3738–39 (preamble); see Halbrook, *Right to Bear Arms*, *supra* note 56, at 37 (“Recognition of bearing arms to defend the state was more radical than self-defense, since it justified action by armed private citizens to defend an incipient state from the constituted authorities of both New York and Great Britain.”). The First Congress admitted Vermont as the fourteenth state, see Act of Feb. 18, 1791, 1 Stat. 191, in time for it to ratify the Bill of Rights, see 2 Schwartz, *Bill of Rights*, *supra* note 67, at 1202–03.

<sup>240</sup> Vt. Const. ch. I, § 14, *reprinted in 6 Federal and State Constitutions*, *supra* note 78, at 3741 (speech); *id.* § 9, at 3740–41 (duty of personal service, and conscientious objectors); *id.* ch. II, § 5, at 3742 (militia of “freemen . . . and their sons”); *id.* § 39, at 3748 (hunting).

<sup>241</sup> See Vt. Const. ch. I, §§ 10, 15 & 18 (1786), *reprinted in 6 id.* at 3753 (duty of personal service and conscientious objectors, speech, and arms, respectively); *id.* ch. II, § 19, at 3758 (militia, including all “inhabitants” rather than all freemen and their sons); *id.* § 37, at 3760 (hunting); Vt. Const. ch. I, arts. 9, 13 & 16 (1793), *reprinted in id.* at 3763–64 (duty of personal service and conscientious objectors, speech, and arms, respectively); *id.* ch. II, § 22, at 3768 (militia); *id.* § 40, at 3770 (hunting).

the military power shall always be held in an exact subordination to the civil authority, and be governed by it.<sup>242</sup>

In addition, Article 1 announced as among the “natural, essential, and unalienable rights” of all men “the right of enjoying and defending their lives and liberties” and “of acquiring, possessing, and protecting property.”<sup>243</sup> Massachusetts was the first state to add “keep” to “bear.” But this double right was said to be “for the common defence,” a phrase that arguably limits the purposes for which one might exercise it. Two towns had unsuccessfully proposed adding “their own and” before that phrase, one arguing that this change would make Article 17 “harmonize much better with” Article 1.<sup>244</sup>

Even assuming that the phrase “for the common defence” limited the purposes for which arms could be kept and borne, the “right” remained an individual one—residing in “the people,” just as Article 19 set out an individual right in providing that “[t]he people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good.”<sup>245</sup> Nothing in Article 17 or any other provision connected the right to service in the militia, much less indicated that this “right” of the “people” belonged to the state or was intended to protect its prerogatives.<sup>246</sup> Moreover, the addition of the word “keep” to the right of the people reinforced the individual nature of the right, because, as explained above in Part II.B.1, the phrase “keep arms” commonly referred to individuals privately possessing their private arms.

The history of the provision reinforces this understanding of its text as securing an individual right. The principal draftsman was John Adams, joined by his cousin Samuel Adams and another individual.<sup>247</sup> As explained above, John Adams publicly acknowledged the individual right inherited from England both before and after he wrote the Declaration, and Samuel Adams both helped lead the Boston town meeting that had urged Bostonians to exercise that individual right

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<sup>242</sup> Reprinted in 3 *Federal and State Constitutions*, supra note 78, at 1892.

<sup>243</sup> Mass. Const. pt. I, art. 1 (1780), reprinted in *id.* at 1889.

<sup>244</sup> See Halbrook, *Right to Bear Arms*, supra note 56, at 41–42.

<sup>245</sup> Mass. Const. pt. I, art. 19, reprinted in 3 *Federal and State Constitutions*, supra note 78, at 1892. An early decision of the state’s supreme court, interpreting the Declaration’s protection of the individual’s “liberty of the press” as not protecting common law libel, drew a parallel to “the right to keep fire arms, which does not protect him who uses them for annoyance or destruction.” *Commonwealth v. Blanding*, 20 Mass. 304, 338 (1825). Whether the court had in mind Article 17 or the right from England is unclear, but in either case it recognized a right of individuals to keep arms.

<sup>246</sup> In addition, the purposes of calling out the militia seem to have been narrower than whatever “for the common defence” signified, as the governor was authorized to call it out “for the special defence and safety of the commonwealth,” which appears to have meant war, invasion, or rebellion. Mass. Const. pt. II, ch. 2, § 1, art. 7, reprinted in 3 *Federal and State Constitutions*, supra note 78, at 1901.

<sup>247</sup> 1 Schwartz, *Bill of Rights*, supra note 67, at 337. The only change between their draft and the final was the deletion of “standing” before “armies.” *Id.* at 372 (draft); *id.* at 364 (deletion).

and publicly defended its resolution on the authority of the English Bill of Rights and Blackstone.<sup>248</sup> Much like Mason, Samuel Adams also would, during the ratification debate, urge that the Constitution protect that right, as we explain below.

Thus, the right of individual English subjects was transplanted to America. Americans also, from their experience in the American Revolution, came to emphasize the citizen militia, which they recognized was furthered by the individual right to private arms. But the English right as Americans came to understand it was not, as a result, somehow newly restricted to a person's service in that militia, much less to service in a select militia. Nor did early Americans see the right as a federalism protection (which would not have made sense in the context of *state* constitutions) or otherwise the property of the state rather than its citizens.

### **C. The Development of the Second Amendment**

The proposed Constitution that emerged from the Constitutional Convention in 1787 did not have a bill of rights, notwithstanding a late effort by Mason, joined by Elbridge Gerry, to have one drawn up “with the aid of the State declarations.”<sup>249</sup> It did contain a careful compromise regarding the militia. The federal government received, in Article I, Section 8, the powers to call out the militia “to execute the Laws of the Union, suppress Insurrections, and repel Invasions,” to provide for “organizing, arming, and disciplining” it, and to govern any part of it in the service of the federal government (during which the President would be its Commander in Chief); states expressly retained the authority to appoint officers and to train the militia.<sup>250</sup>

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<sup>248</sup> As with North Carolina's emphasis on the “defence of the State,” Massachusetts's emphasis on the “common defence” may have represented the assertion of a right that went beyond the traditional English one. “Common” had been deleted from a similar clause (“for their common defence”) in a draft of the English Declaration, perhaps at the urging of William of Orange or conservative Lords, who objected to suggestion of a popular right to check royal power. See Malcolm, *To Keep and Bear Arms*, *supra* note 33, at 119–21.

<sup>249</sup> Madison, *Notes of Debates*, *supra* note 44, at 630 (Sept. 12, 1787).

<sup>250</sup> U.S. Const. art. I, § 8, cls. 15 & 16, and art. II, § 2, cl. 1. The Ninth Circuit claims that there was “disagreement among the delegates” over whether Congress's power to arm the militias “should be exclusive or concurrent” with the states. *Silveira*, 312 F.3d at 1079. But the court only cites *Perpich v. Dep't of Defense*, 496 U.S. 334, 340 (1990), which does not support this claim; nor do the debates of the Convention, where the focus was on the extent of any federal authority to establish uniform discipline and regulation of the militia (including providing for arms), not on whether the states would retain concurrent authority in areas where federal power was granted. For the two chief debates, see Madison, *Notes of Debates*, *supra* note 44, at 478, 483–85 (Aug. 18, 1787); *id.* at 512–16 (Aug. 23, 1787). Similarly, the Third Circuit has cited, in support of the collective right view, a statement by Roger Sherman that states should retain power to use their militias for internal needs. See *United States v. Tot*, 131 F.2d 261, 266 (1942), *rev'd on other grounds*, 319 U.S. 463 (1943) (citing 5 *Elliot's Debates* 445 (2d ed. 1901)). We fail to see how this statement supports that view, particularly given that no one appears to have disagreed with Sherman; that he served on the committee that drafted what

Proposed bills of rights emerged from the ratifying conventions of several of the states. Many of these included protection for the right to arms—usually in language borrowed or adapted from the individual right to arms in the states’ declarations of rights, and in any event always in language indicating an individual right. In those proposals, several states for the first time in a single constitutional provision both set out an individual right to arms and praised the citizen militia, uniting language from the different state declarations discussed above. In addition, some Anti-Federalists, concerned about the Constitution’s allocation of powers over the militia, sought to protect the ability of the states to maintain effective militias. They proposed to do so expressly, in amendments using language similar to that of Article I, Section 8, and to be placed in the body of the Constitution, not in a bill of rights.<sup>251</sup>

Yet it was the former proposals that laid the foundation for the Second Amendment. And the latter proposals failed in the Federalist-controlled First Congress, which was, as many recognized at the time, willing to protect individual rights but not to alter the balance of power struck by the new Constitution between the states and the nascent federal government. Thus, the evidence points to an understanding of the Amendment as securing the individual right to arms already well established in America, rather than safeguarding the ability of states to establish well-regulated militias, whether through a “collective right” of states or a quasi-collective right of militiamen. Rather than “lay down any novel principles of government,” the Second Amendment embodied the individual “guarant[ee] and immunit[y]” to which Americans were accustomed.<sup>252</sup>

## **1. Recommendations From the Ratification of the Original Constitution**

Although the right of individuals to have arms was not a subject of much direct discussion in the ratification debates, two major topics are relevant. First, Anti-

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became the final version of Article I, Section 8, Clause 16, Madison, *Notes of Debates* at 480, 485 (Aug. 18, 1787); *id.* at 494–95 (Aug. 21, 1787), and generally supported its compromise, *id.* at 513–14; and that he saw no need for amendments, *see A Countryman No. 2* (1787), *reprinted in 14 Ratification*, *supra* note 67, at 172 (John P. Kaminski & Gaspare J. Saladino eds., 1983); *A Countryman No. 3* (1787), *reprinted in id.* at 296; *A Citizen of New Haven* (1789), *reprinted in Creating the Bill of Rights*, *supra* note 82, at 220.

<sup>251</sup> The Ninth Circuit in *Silveira* did not mention this latter set of proposals, and the court presented the comments in the ratification debates most relevant to these separate proposals as if they instead related to the Second Amendment. *See* 312 F.3d at 1082–83; *see also id.* at 1078 (claiming without citation that “[t]he compromise that the convention eventually reached, which granted the federal government the dominant control over the national defense, led ultimately to the enactment of the counter-balancing Second Amendment”).

<sup>252</sup> *Robertson*, 165 U.S. at 281 (discussing Bill of Rights in general); *see Silveira*, 328 F.3d at 584 (Kleinfeld, J., joined by Kozinski, O’Scannlain, and T.G. Nelson, JJ., dissenting from denial of rehearing en banc) (“The Second Amendment was not novel, but rather codified and expanded upon long established principles.”).

Federalists objected to the absence of a bill of rights, often pointing to the English Bill of Rights (as well as the declarations of the states) as models.<sup>253</sup> The Federalists' response likewise recognized the English precedent, but sought to distinguish it on various grounds or to argue that many rights, such as the English Bill of Rights' ban on "cruel and unusual punishments," or "the liberty of the press" (which developed after the Bill), were too indefinite to provide dependable legal protections.<sup>254</sup>

Second, Anti-Federalists denounced the militia powers to be granted to the federal government, warning that it would destroy the militia through any number of means—by neglecting it, by creating a select militia and then neglecting the general militia, or (somewhat inconsistently<sup>255</sup>) by destroying the militia through onerous discipline and excessive deployment. The arguments from neglect rested on the premise that Congress's power of organizing, arming, and disciplining the militia would foreclose any such state power. If true, the militia might be left without any government ensuring its arming and training. The arguments also were premised on the common understanding of the "militia" as the citizen militia: The Federal Farmer, the leading Anti-Federalist essayist, admonished that "to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them," and Patrick Henry, leader in the Virginia Ratifying Convention, warned, "The great object is, that every man be armed. . . . When this power is given up to Congress without limitation or bounds, how will your militia be armed?"<sup>256</sup> Anti-Federalists also warned that Congress would use its power to establish a standing army to trample

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<sup>253</sup> See, e.g., 2 *Complete Anti-Federalist*, *supra* note 101, at 7, 11 (public objections of Mason and Gerry); Va. Ratif. Conv., *reprinted in* 10 *Ratification*, *supra* note 67, at 1212 (remarks of Patrick Henry, June 12, 1788) (invoking English Bill and state declarations); Address by Sydney (Robert Yates) (1788), *reprinted in* 6 *Complete Anti-Federalist*, *supra* note 101, at 107, 109 (similar to Henry). One of the leading arguments of this point was by the Federal Farmer. See *Federal Farmer No. 16* (1788), *reprinted in* 2 *Complete Anti-Federalist*, *supra* note 101, at 323.

<sup>254</sup> See, e.g., *The Federalist No. 84*, at 575–81 (Alexander Hamilton); *Marcus No. 1, Answer to Mr. Mason's Objections* (James Iredell) (1788), *reprinted in* 1 *Debate on the Constitution*, *supra* note 97, at 363–64; *Marcus No. 4* (1788), *reprinted in id.* at 387–90; *America, To the Dissenting Members of the late Convention of Pennsylvania* (Noah Webster) (1787), *reprinted in* 1 *Debate on the Constitution*, *supra* note 97, at 555–60.

<sup>255</sup> As one Federalist criticized Luther Martin, an Anti-Federalist who had been a delegate to the Constitutional Convention: "One hour you sported the opinion, that Congress, afraid of the militia resisting their measures, would neither arm nor organize them: and the next, as if men required no time to breathe between such contradictions, that they would harass them by long and unnecessary marches, till they wore down their spirit and rendered them fit subjects for despotism." *The Landholder No. 10* (1788), *reprinted in* 16 *Ratification*, *supra* note 67, at 265, 267 (John P. Kaminski & Gaspare J. Saladino eds., 1986).

<sup>256</sup> *Federal Farmer No. 18* (1788), *reprinted in* 2 *Complete Anti-Federalist*, *supra* note 101, at 342; Va. Ratif. Conv., *in* 10 *Ratification*, *supra* note 67, at 1276 (Henry, June 14, 1788).

traditional liberties, particularly after it had destroyed the militia.<sup>257</sup> The Federalists' response emphasized the same understanding of the citizen militia, asking how the federal government could tyrannize over a populace armed as America's was.<sup>258</sup> As already noted in Part II.D.2 above, they also argued that, in any event, the states would retain a concurrent power over their militias, including a power to arm them.<sup>259</sup>

Two separate categories of proposed amendments resulted from these two sets of arguments. Proposed amendments to protect the right to keep and bear arms not only were phrased as individual rights (even when accompanied by language concerning the militia and civilian control of the military) but also were distinct from proposals that would safeguard state powers over the militia or restrain federal power to create a standing army. (Restriction on standing armies would

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<sup>257</sup> See, e.g., regarding all of these concerns, *John De Witt No. 5* (1787), reprinted in 4 *Complete Anti-Federalist*, supra note 101, at 36–37 (warning that federal government would neglect to arm militia, not trusting the people, and enforce unjust laws through standing army); Pa. Ratif. Conv., in 2 *Ratification*, supra note 67, at 509 (remarks of John Smilie, Dec. 6, 1787) (“When a select militia is formed; the people in general may be disarmed.”); *Federal Farmer No. 3* (1787), reprinted in 2 *Complete Anti-Federalist*, supra note 101, at 242 (discounting safeguard of armed “yeomanry of the people,” whom Congress would undermine through creating select militia); *The Genuine Information Delivered to the Legislature of the State of Maryland Relative to the Proceedings of the General Convention Lately Held at Philadelphia; By Luther Martin, Esquire* (1788), reprinted in 2 *Complete Anti-Federalist*, supra note 101, at 59–60 (warning that Congress would use its militia and army powers “to subvert the liberties of the States and their citizens, since we [allow an unlimited standing army and,] by placing the militia under its power, enable it to leave the militia totally unorganized, undisciplined, and even to disarm them”); Va. Ratif. Conv., in 10 *Ratification*, supra note 67, at 1271 (remarks of Mason, June 14, 1788) (warning that Congress would “disarm the people” gradually, rather than “openly,” by “totally disusing and neglecting the militia”). Henry repeatedly denounced the allegedly exclusive power. See 9 *Ratification*, supra note 67, at 957 (June 5) (“Of what service would militia be to you, when most probably you will not have a single musket in the State; for as arms are to be provided by Congress, they may or may not furnish them.”); *id.* at 1066 (June 9) (“The power of arming the militia, and the means of purchasing arms, are taken from the States . . . . If Congress will not arm them, they will not be armed at all.”).

<sup>258</sup> See, e.g., *The Federalist No. 46*, at 321–22 (James Madison) (contrasting the “advantage of being armed, which the Americans possess,” with the circumstances in “several kingdoms of Europe . . . [where] the governments are afraid to trust the people with arms”); *An American Citizen IV: On the Federal Government* (Tench Coxe) (1787), reprinted in 13 *Ratification*, supra note 67, at 433 (John P. Kaminski & Gaspare J. Saladino eds., 1981) (arguing that, if tyranny threatened, the “friends to liberty . . . using those arms which Providence has put into their hands, will make a solemn appeal ‘to the power above’”); A Citizen of America, *An Examination Into the Leading Principles of the Federal Constitution* (Noah Webster) (1787), reprinted in 1 *Debate on the Constitution*, supra note 97, at 155 (“Before a standing army can rule the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed”).

<sup>259</sup> John Marshall, for example, provided a standard analysis: “The truth is, that when power is given to the General Legislature, if it was in the State Legislatures before, both shall exercise it; unless there be an incompatibility in the exercise by one, to that by the other; or negative words precluding the State Governments from it. But there are no negative words here. It rests therefore with the States.” Va. Ratif. Conv., in 10 *Ratification*, supra note 67, at 1307 (June 16, 1788).

help ensure that the new government maintained the militia, by ensuring the government's dependence on it.)

Pennsylvania's Convention, the second to meet, ratified the Constitution by a 2 to 1 margin in December 1787, without proposing amendments.<sup>260</sup> A week later, 21 of the 23 dissenting delegates published their *Address and Reasons of Dissent* ("Minority Report"), including amendments that they had proposed but the convention had refused to consider. It drew heavily from the 1776 Pennsylvania Declaration of Rights. The proposal regarding arms was Article 7, immediately following one stating that "the people have a right to the freedom of speech," and it read as follows:

That the people have a right to bear arms for the defence of themselves and their own State or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to, and be governed by the civil powers.<sup>261</sup>

Article 8, immediately following, protected the right to hunt on one's private property and certain other lands.<sup>262</sup>

Separately, the Minority sought, in Article 11, both to restrict Congress's Article I, Section 8, Clause 16 powers over the militia and to protect state authority over it, by providing "[t]hat the power of organizing, arming and disciplining the militia (the manner of disciplining the militia to be prescribed by Congress), remain with the individual States."<sup>263</sup> They warned that, without *this* restriction, Congress's power over the militia could place "every man, probably from sixteen to sixty years of age" under Congress's power and military discipline—

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<sup>260</sup> Delaware already had ratified unanimously. After Pennsylvania's vote, New Jersey, Georgia, and Connecticut ratified by large majorities. No proposed amendments emerged from these conventions. See 2 Schwartz, *Bill of Rights*, *supra* note 67, at 627, 674. Maryland ratified on April 26, 1788, without proposing amendments, although a committee had approved several, including a prohibition on subjecting the militia to martial law "except in time of war, invasion, or rebellion." The committee understood the militia to consist of "all men, able to bear arms," which would make martial law for the militia a pretext for applying it to the populace. See *id.* at 729–30, 734–35.

<sup>261</sup> 2 Schwartz, *Bill of Rights*, *supra* note 67, at 665. Tench Coxe, in a critique of the Minority, described this proposal as a "provision against disarming the people." *Philanthropos*, Penn. Gazette, 1788, reprinted in 15 *Ratification*, *supra* note 67, at 391, 393.

<sup>262</sup> 2 Schwartz, *Bill of Rights*, *supra* note 67, at 665. Noah Webster suggested that the Minority also propose "[t]hat Congress shall never restrain any inhabitant of America from eating and drinking, *at seasonable times*." His serious criticism of Article 8 was that it was useless because aimed at game laws, which had never existed in America. He did not comment on Article 7. *America*, Daily Advertiser, 1787, reprinted in 1 *Debate on the Constitution*, *supra* note 97, at 559–60.

<sup>263</sup> 2 Schwartz, *Bill of Rights*, *supra* note 67, at 665.

particularly “our young men, . . . as a select militia, composed of them, will best answer the purposes of government”—and also could leave conscientious objectors compelled to bear arms in the militia.<sup>264</sup> As in Pennsylvania’s 1776 declaration and constitution, a right to bear arms was distinct from bearing arms in service to the government. There was no suggestion that the individual right somehow would directly guard the states’ power, and this separate proposal and comment indicate that the Minority believed that it would not.

The Massachusetts Convention was the first to include with its ratification, in February 1788, a list of recommended amendments. The Federalists prepared and had John Hancock introduce the nine proposals to woo marginal Anti-Federalists. Samuel Adams, while supporting Hancock’s list, also led an effort to add several rights that would appear in the First, Second, and Fourth Amendments, plus a ban on standing armies “unless when necessary for the defence of the United States, or of some one or more of them.” Regarding arms, he proposed that the Constitution “be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms.” This language indicated that the “people” consisted of the “citizens,” who would, so long as they were peaceable, individually keep private arms. Adams’s proposed additions were voted down, and the Convention then narrowly voted to ratify and to recommend the Federalists’ list.<sup>265</sup>

Four months later, New Hampshire’s Convention, also closely divided, adapted some of Adams’s proposals.<sup>266</sup> It recommended the nine amendments that Massachusetts had, but added three: one calling for a supermajority before Congress could keep up a standing army in peacetime; the next barring Congress from making laws regarding religion or infringing the rights of conscience; and the final one providing that “Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion.”<sup>267</sup> New Hampshire thus became the first state whose ratifying convention as a body recommended that the Constitution protect a right to arms. Again, the right belonged to the individual citizen.

Although New Hampshire had provided the crucial ninth state for the Constitution to take effect,<sup>268</sup> the convention of Virginia, occurring simultaneously and concluding four days later (on June 25, 1788), had particular importance, not only because of the possibility that Virginia would be the ninth state to ratify but also because of the state’s significance, the prominence of its leaders, and the strength

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<sup>264</sup> *Id.* at 671–72.

<sup>265</sup> *Id.* at 674–75, 681. South Carolina ratified in May 1788 without proposing any relevant amendments. *See id.* at 739, 756–57.

<sup>266</sup> The convention had adjourned in February 1788 to avoid a vote against ratification. When it reconvened in the summer, it ratified by a vote of 57 to 47. *See id.* at 758.

<sup>267</sup> *Id.* at 761; *see id.* at 758 (noting that the first nine New Hampshire amendments “were taken almost verbatim from those proposed by Massachusetts”).

<sup>268</sup> *Id.* at 758. *See* U.S. Const. art. VII.

of the Anti-Federalists, led by Patrick Henry.<sup>269</sup> The convention did vote to ratify, but also recommended numerous amendments. Written by a committee of Mason, Henry, Madison, George Wythe, and John Marshall, twenty were proposed for a separate bill of rights and twenty for the body of the Constitution. Those in the former category amounted to the first full bill of rights proposed by a state convention, and most made their way into the federal Bill of Rights.<sup>270</sup>

The proposal regarding arms appeared in the bill, immediately after the “right[s]” of “the people” to assemble and petition and to speak, write, and publish. It was a synthesis from the leading state declarations, providing:

That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.<sup>271</sup>

The two strands evident in the Revolutionary Era—an individual right to arms and high regard for the citizen militia—were brought together: The proposal combined an individual right to arms provision such as those from the Pennsylvania and Massachusetts Declarations with the praise of the militia from Virginia’s. The “people” would have a right to keep and bear arms, and a well-regulated militia composed “of the *body* of the people”—the people as an organized whole—would protect “a free state.” This language became the foundation for the Second Amendment. In addition, the combination of the two clauses indicates (as the differing first clauses of the analogous articles in the Virginia and Pennsylvania Declarations had done separately) that the individual right and the well-regulated militia *both* would contribute to the avoidance of standing armies and to civilian rule.

Only in its separate list of amendments for the body of the Constitution did the Virginia convention directly protect the power of states to maintain militias and restrict the federal power to raise standing armies. It recommended a supermajority vote for Congress to maintain a peacetime army (in the spirit of Samuel Adams and the New Hampshire Convention), and it sought to protect state power over the militia (much as the Pennsylvania Minority had) with the following provision:

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<sup>269</sup> See 2 Schwartz, *Bill of Rights*, *supra* note 67, at 762, 764.

<sup>270</sup> See *id.* at 765–66.

<sup>271</sup> 2 Schwartz, *Bill of Rights*, *supra* note 67, at 842. Mason drafted this provision. See 9 *Ratification*, *supra* note 67, at 821 (reprinting Mason’s draft). Two articles later, Virginia also proposed exemptions for those “religiously scrupulous of bearing arms,” again borrowing from Pennsylvania’s Declaration. 2 Schwartz, *Bill of Rights*, *supra* note 67, at 842.

That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same.<sup>272</sup>

These distinct proposals confirm what is evident from the declarations included with the proposal for the bill of rights: The individual right of the people to keep and bear arms does not directly guard any power of states to maintain militias. (Much less does it guarantee against standing armies.) But it does *indirectly* further the policy of having a well-regulated militia of the body of the people, as well as that of mitigating the need for and risk from a standing army.

The New York Convention, voting just over a month after Virginia's (and ratifying by only 30–27), followed Virginia's model. The separate declaration of rights included both an individual right to keep and bear arms (immediately after the "right" of "the People" to free exercise of religion) and declarations regarding the militia and standing armies:

That the People have a right to keep and bear Arms; that a well regulated Militia, including the body of the People capable of bearing arms, is the proper, natural, and safe defence of a free State.

. . . .

That standing Armies in time of Peace are dangerous to Liberty, and ought not to be kept up, except in Cases of necessity; and that at all times, the Military should be under strict Subordination to the civil Power.<sup>273</sup>

For the body of the Constitution, New York proposed, like New Hampshire and Virginia, an amendment requiring a supermajority for Congress to maintain a peacetime standing army. It did not propose express protection of state power over the militia.<sup>274</sup>

The force of Virginia's proposals is evident not only in New York's borrowing but also in the first North Carolina Convention. On August 1, 1788, North Carolina became the only state to decline to ratify until the Constitution had been amended to include a bill of rights (Rhode Island had declined even to call a convention), and it proposed verbatim the amendments that Virginia had proposed—including the individual right to keep and bear arms and the *separate* proposals, for the body of the Constitution, guarding state power over the militias and mandating supermajorities for standing armies. North Carolina's actions made

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<sup>272</sup> 2 Schwartz, *Bill of Rights*, *supra* note 67, at 843.

<sup>273</sup> *Id.* at 912. New York did not propose any protection for conscientious objectors.

<sup>274</sup> *Id.* at 915, 918.

the momentum for a bill of rights “virtually irresistible,” and, two months after Congress approved one, a new convention ratified.<sup>275</sup>

Every recommendation in these state conventions regarding the right to arms sought to protect an individual right—not a “right” to maintain well-regulated state militias, whether belonging to the states or to those serving in such entities (much less belonging just to those serving in well-regulated *select* militias). Virginia, New York, and North Carolina also appended declaratory clauses to the right suggesting that it would benefit the citizen militia, preserve the freedom of the state, and reduce the need for or risk from a standing army. But those states that wanted to protect state authority to maintain militias (Virginia and North Carolina) followed the lead of the Pennsylvania Minority by proposing separate amendments doing so directly, intended not for the bill of rights but for the body of the Constitution. Thus, regarding the right to arms, those who ratified the Constitution did nothing novel, but rather followed the path marked by the state declarations and the earlier right from England. They proposed an individual right, not a “right” of states and not a right restricted to their militias or militiamen. As the First Congress met, it had before it numerous proposals for an individual right to arms and a few proposals for safeguarding state militias by directly protecting state authority, but none for protecting that authority through a collective or quasi-collective “right” to arms.

## **2. The Drafting and Ratification of the Second Amendment**

When the First Congress convened in 1789, Federalist Congressman James Madison moved quickly to win over marginal Anti-Federalists by responding to the calls for a bill of rights. The House soon approved seventeen amendments. The Senate reduced these to twelve, of which the states ratified the ten that form the Bill of Rights.

The Federalists, victorious in ratification and dominant in Congress, openly avoided any amendment that would materially alter the balance of power with the states or otherwise threaten legitimate federal powers. Thus, the amendments that Congress approved were devoted almost exclusively to protecting individual rights. Of the categories of proposals discussed in the previous subpart, only the first—the individual right of the people to keep and bear arms—received approval. The separate proposals for protecting state power to organize, discipline, and arm the militia and for restricting federal power to maintain standing armies failed.

President Washington set the stage in his inaugural address, urging Congress to consider amendments out of “a reverence for the characteristic rights of freemen” but “carefully avoid every alteration which might endanger the benefits of an

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<sup>275</sup> *Id.* at 932–33, 968–69; Halbrook, *Right to Bear Arms*, *supra* note 56, at 33–34.

united and effective government.”<sup>276</sup> Madison reiterated this view in introducing his proposals in June 1789:

It will be a desirable thing to extinguish from the bosom of every member of the community, any apprehensions that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled.

. . . .

I should be unwilling to see a door opened for a re-consideration of the whole structure of the government, for a re-consideration of the principles and the substance of the powers given . . . . But I do wish to see a door opened to consider, so far as to incorporate those provisions for the security of rights . . . .

. . . .

I believe that the great mass of the people who opposed [the Constitution], disliked it because it did not contain effectual provision against encroachments on particular rights, and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercised the sovereign power.<sup>277</sup>

Madison also urged Congress to “expressly declare the great rights of mankind” and provide “those securities for liberty” demanded by North Carolina and Rhode Island. In contrast, he was confident that those who opposed the Constitution’s “structure,” powers, or restrictions on state powers were a much smaller group.<sup>278</sup> Other congressmen similarly hoped that such an approach would win over many of the disaffected in various states.<sup>279</sup>

Anti-Federalist leaders recognized this focus on individual rights. Richard Henry Lee, one of Virginia’s first senators, reported to Patrick Henry about a week before Madison’s speech “that many of our amendments will not succeed, but my

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<sup>276</sup> First Inaugural Address (Apr. 30, 1789), reprinted in 1 *A Compilation of the Messages and Papers of the Presidents* 43, 45 (James D. Richardson ed., 1897).

<sup>277</sup> Speech of Madison (June 8, 1789), reprinted in *Creating the Bill of Rights*, *supra* note 82, at 78–79.

<sup>278</sup> *Id.*

<sup>279</sup> See Letter from Rep. Fisher Ames to George R. Minot (July 23, 1789) (discussing North Carolina), reprinted in *Creating the Bill of Rights*, *supra* note 82, at 269; Letter from Rep. William L. Smith to Edward Rutledge (Aug. 9, 1789) (North Carolina; noting disposition of House to “agree to some, which will more effectually secure private rights”), reprinted in *id.* at 272–73; Letter from Rep. Frederick A. Muhlenberg to Benjamin Rush (Aug. 18, 1789) (Pennsylvania Minority), reprinted in *id.* at 280.

hopes are strong that such as may effectually secure civil liberty will not be refused.”<sup>280</sup> Soon after Madison spoke, Virginia’s other senator, William Grayson, wrote to Henry that Madison’s proposals “altogether respected personal liberty.”<sup>281</sup>

Among Madison’s proposals was the following, which became the Second Amendment:

The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.<sup>282</sup>

The first and second clauses resembled the proposals of the Virginia, New York, and North Carolina conventions, including by making the connection between the individual right and the militia. The first clause stated, as they had, a right both to keep and to bear arms, which belonged to “the people.” Having made this into a full sentence, Madison made the second clause, which had been free-standing in the Virginia, New York, and North Carolina proposals, subordinate to the first. In shortening the second clause, he omitted the definition of the militia, just as Delaware, Maryland, and New Hampshire had done in their declarations of rights.<sup>283</sup> He also omitted the conventions’ disparagement of standing armies and admonition to civilian rule, and appended protection for conscientious objectors, which the Pennsylvania Minority, Virginia, and North Carolina had separately requested. As the Pennsylvania and Vermont Declarations had shown even before ratification, there was no inconsistency in recognizing both an individual right to “bear arms” and an individual exemption from being compelled to “bear arms” in military service.

That Madison envisioned this proposed “right of the people” to secure an individual right is confirmed by the notes for his speech, in which he wrote that those provisions “relat[ing] to what may be called a bill of rights,” including this one, “relate . . . to *private rights*”;<sup>284</sup> by his using in his speech the same language to discuss both the rights of English subjects and those in his proposed bill,<sup>285</sup> and by

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<sup>280</sup> Letter from Lee to Henry (May 28, 1789), *reprinted in Creating the Bill of Rights, supra* note 82, at 241.

<sup>281</sup> Letter from Grayson to Henry (June 12, 1789), *reprinted in id.* at 249. *See also* Letter from Joseph Jones to Madison (June 24, 1789), *reprinted in id.* at 253 (describing Madison’s proposed amendments as well “calculated to secure the personal rights of the people”).

<sup>282</sup> Madison Resolution (June 8, 1789), *reprinted in id.* at 12.

<sup>283</sup> *See above* Part III.B.2, at note 225 (discussing differences from Virginia Declaration).

<sup>284</sup> Notes for Speech in Congress (ca. June 8, 1789), *reprinted in 12 The Papers of James Madison* 193, 193 (Charles F. Hobson et al. eds., 1979) (emphasis added); *see id.* at 194–95; Speech of Madison, *reprinted in Creating the Bill of Rights, supra* note 82, at 80.

<sup>285</sup> *Compare* Speech of Madison, *reprinted in Creating the Bill of Rights, supra* note 82, at 80 (discussing “the declaration of rights” of England), *with id.* at 84 (concluding by describing his proposals “as a declaration of the rights of the people”). In his notes, although apparently not in his

the location in the body of the Constitution in which he proposed to place these amendments. He recommended that the right to arms, along with antecedents of the First, Third, Fourth, Eighth, Ninth, and portions of the Fifth and Sixth Amendments, be added in Article I, Section 9, immediately after clauses protecting three other individual rights: the writ of habeas corpus and the prohibitions against *ex post facto* laws and bills of attainder.<sup>286</sup> It is reasonable to assume that Madison viewed the additional rights as likewise belonging to the individual.<sup>287</sup> Had he instead intended to protect state militias (whether directly through a collective right or indirectly through a quasi-collective right), a more reasonable location would have been in or near the two clauses in Article I, Section 8, that granted congressional power over the militia, one of which already “reserv[ed] to the States” certain powers over the militia. And Madison likely would have drawn from the separate language that Virginia and others had proposed for just this purpose—but those proposals had the potential to threaten the balance of powers, at least by inviting disputes over whether the federal government had “neglect[ed]” the militia.

Others also understood Madison’s proposal to secure an individual right to keep and bear arms. Leading Federalist Congressman Fisher Ames wrote: “Mr. Madison has introduced his long expected Amendments. . . . It contains a Bill of Rights . . . [including] the right of the people to bear arms.”<sup>288</sup> Elsewhere he wrote: “The rights of conscience, of bearing arms, of changing the government, are declared to be inherent in the people.”<sup>289</sup> Tench Coxe took the same view in his *Remarks on the First Part of the Amendments to the Federal Constitution*, published in the major cities. Writing as “A Pennsylvanian” (a pseudonym that he had used during the ratification debates), he explained the right that Madison’s proposal protected as follows:

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speech, he pointed out that the English right to arms was limited to Protestants. 12 *Madison Papers*, *supra* note 284, at 193–94.

<sup>286</sup> See *Creating the Bill of Rights*, *supra* note 82, at 12 (Madison’s proposal); *id.* at 80, 84 (Madison’s speech). His separate proposal of what would become the Tenth Amendment was to be placed between Articles 6 and 7, as its own article. *Id.* at 13–14.

<sup>287</sup> The arguable exception, as discussed above in Part II.D.1 regarding the Establishment Clause, was a prohibition on “any national religion.” Madison proposed other amendments that did not relate to private rights, such as altering the ratio of representation in the House of Representatives and banning increases of legislator pay without an ensuing election, but he proposed to place these elsewhere in the Constitution. *Id.* at 12.

<sup>288</sup> Letter from Ames to Thomas Dwight (June 11, 1789), *reprinted in Creating the Bill of Rights*, *supra* note 82, at 247.

<sup>289</sup> Letter from Ames to George R. Minot (June 12, 1789), *reprinted in Creating the Bill of Rights*, *supra* note 82, at 247–48. The right of “changing the government” to which Ames referred was a provision, in a separate section of Madison’s proposal, affirming the right of the people “to reform or change their government, whenever it be found adverse or inadequate to the purposes of its institution.” Regarding such usage of the “the people,” see Part II.A above.

As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow citizens, the people are confirmed by the . . . article in their right to keep and bear their private arms.<sup>290</sup>

Coxe recognized that the “right” of “the people” belonged to the “citizens,” who could both keep and bear “private” arms. He sent his *Remarks* to Madison the day that they were published, and Madison six days later returned thanks for his “explanatory strictures” and the “co-operation of your pen,” noting from New York City that the *Remarks* “are already I find in the Gazettes here.”<sup>291</sup> Neither Madison nor, it appears, anyone else disputed Coxe’s interpretation.<sup>292</sup> Samuel Nasson, who had been an Anti-Federalist delegate to the Massachusetts Ratifying Convention, described the right similarly in a letter to a Federalist congressman from the state a month after Madison introduced his proposals:

I find that Ammendments are once again on the Carpet. I hope that such may take place as will be for the Best Interest of the whole[.] A Bill of rights well secured that we the people may know how far we may Proceede in Every Department[.] then their will be no Dispute Between the people and rulers[.] [I]n that may be secured the right to keep arms for Common and Extraordinary Occations such as to secure ourselves against the wild Beast and also to amuse us by fowling and for our Defence against a Common Enemy[.] [Y]ou know to learn the Use of arms is all that can Save us from a forighn foe that may attempt to subdue us[,] for if we keep up the Use of arms and become acquainted with them we Shall allway be able to look them in the face that arise up against us[.]<sup>293</sup>

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<sup>290</sup> Philadelphia Fed. Gazette, June 18, 1789, at 2, *excerpted in* Kates, *supra* note 33, 82 Mich. L. Rev. at 224 & nn. 81–82. The *Remarks* were reprinted within three weeks in newspapers in Boston (on the front page of a special July 4 issue) and New York. *See* Stephen P. Halbrook & David B. Kopel, *Tench Coxe and the Right to Keep and Bear Arms, 1787–1823*, 7 Wm. & Mary Bill Rts. J. 347, 367 (1999).

<sup>291</sup> *See* Letter from Coxe to Madison (June 18, 1789), *reprinted in* *Creating the Bill of Rights*, *supra* note 82, at 252–53; Letter from Madison to Coxe (June 24, 1789), *reprinted in* 12 *Madison Papers*, *supra* note 284, at 257; *see also* *Creating the Bill of Rights*, *supra* note 82, at 254 (excerpting Madison’s letter).

<sup>292</sup> *See* Halbrook, *That Every Man Be Armed*, *supra* note 33, at 77 (noting that author’s “search of the literature of the time reveals that no writer disputed or contradicted Coxe’s analysis”).

<sup>293</sup> Letter from Nasson to Thatcher (July 9, 1789), *reprinted in* *Creating the Bill of Rights*, *supra* note 82, at 260–61 (sic); *see id.* at 309 (brief biography of Nasson).

Like Coxe and others, Nasson understood “the people” as distinct from the government, and included in “the right” of the people private ownership and private uses of arms.

In late July 1789, a committee, to which had been referred both Madison’s proposals and all amendments that ratifying conventions had proposed, issued a revised draft. It provided:

A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed, but no person religiously scrupulous shall be compelled to bear arms.<sup>294</sup>

The Committee had left unchanged the text of Madison’s independent clause stating the right. But it had inverted the first two clauses, modified the language regarding the militia to return it somewhat to what had been proposed by some of the state conventions (including by defining the militia), and revised the conscientious objector clause.

There is no reason to suppose that the mere reversal of order, or any of the other changes, had altered the right that Madison, and the ratifying conventions before him, had set out: The operative text of the independent clause was unchanged from Madison’s draft, with the militia clause retaining its subordinate relationship; Madison had served on the committee, which does not seem to have had any serious disagreements over content;<sup>295</sup> and the committee had retained Madison’s proposal that this amendment, along with the rest of the “Bill of Rights,” be placed among the three pre-existing individual rights in Article I, Section 9, albeit moved forward one clause.<sup>296</sup> In the ensuing debates, no member of the House suggested that any change in the right had occurred. The Speaker of the House, from Pennsylvania, wrote to a leading fellow Federalist in the state that the committee’s proposals “take[] in the principal Amendments which our Minority had so much at heart”; the Minority had, as discussed above, proposed an individual right to bear arms.<sup>297</sup> And an article in Boston, reprinted in Philadelphia, described the committee’s proposal as containing “[e]very one of” the amendments “introduced to the convention of this common-

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<sup>294</sup> *Creating the Bill of Rights*, *supra* note 82, at 30.

<sup>295</sup> *Id.* at 6, 102–03; see Letter from Madison to Wilson Cary Nicholas (Aug. 2, 1789), *reprinted in id.* at 271 (referring to “the concord” of the committee); Letter from Roger Sherman to Henry Gibbs (Aug. 4, 1789), *reprinted in id.* (another committee member, predicting that committee’s proposals “will probably be harmless & Satisfactory to those who are fond of Bills of rights,” although noting his desire to place them at the end of the Constitution).

<sup>296</sup> See *id.* at 30. The separate placement of what would become the Tenth Amendment remained unchanged, and Madison’s other proposals, noted above, also remained separate.

<sup>297</sup> Letter from Rep. Frederick A. Muhlenberg to Benjamin Rush (Aug. 18, 1789), *reprinted in Creating the Bill of Rights*, *supra* note 82, at 280 (writing after the first day of debate that involved the arms provision, in which no changes were made, and describing proposed amendments to date as “nearly the same as” the committee “had reported them”).

wealth by . . . Samuel Adams” (except the restriction against a standing army), including that “the said constitution be never construed . . . to prevent the people of the United States who are peaceable citizens, from keeping their own arms.”<sup>298</sup> Clearly, the committee’s proposed amendment on arms, like Madison’s and like Adams’s, was understood to protect an individual right.

In floor debate that began in mid-August, the focus was on the concluding exemption for conscientious objectors and thus on militia service rather than “the right of the people” that the committee’s draft secured. Representative Gerry of Massachusetts, who had refused to sign the Constitution and was a leading Anti-Federalist,<sup>299</sup> objected that this final clause would enable the federal government to “declare who are those religiously scrupulous, and prevent them from bearing arms.” This, he warned, “together with [Congress’s] other powers,” would enable Congress to “destroy the militia” and establish “a standing army, the bane of liberty.”<sup>300</sup> He moved to narrow the clause, but after a debate, including an effort to delete it, the House approved the committee’s draft. Immediately after, it resoundingly defeated another Anti-Federalist’s motion to require a supermajority to authorize a standing army in peacetime.<sup>301</sup>

It does not appear from the debates that any congressman shared Gerry’s concern, but, in any event, his concern seems more consistent with a view that the amendment secured an individual right than with the alternative views. Gerry presumed that the first two clauses—praising the well-regulated militia and setting out the right of the people—would not suffice to protect the militia in the face of affirmative federal efforts to undermine it. The individual right was inadequate to do so. That understanding is consistent with the individual right view, as we explained above in Part II.C. It also was the understanding, and concern, implicit in the dual recommendations of Virginia, North Carolina, and the Pennsylvania Minority, which sought separately to protect both state militia powers and the individual right to arms. In addition, if the “right of the people . . . to bear arms” meant some right restricted to serving in an organized militia, rather than a personal right, Gerry’s concern would not have made sense: Persons whom Congress declared religiously scrupulous pursuant to the proposed amendment, although therefore not “*compelled to bear arms*” in the militia, still would, under a

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<sup>298</sup> From the Bos. Indep. Chronicle, Phila. Indep. Gazetteer, Aug. 20, 1789, at 2, *excerpted in Halbrook, Right to Bear Arms, supra* note 56, at 45.

<sup>299</sup> At the Constitutional Convention, Gerry had bitterly opposed the federal powers over the militia in Article I, Section 8, Clause 16. Madison, *Notes of Debates, supra* note 44, at 513–16 (Aug. 23, 1787). Regarding his Anti-Federalist writings during ratification, *see* 1 Schwartz, *Bill of Rights, supra* note 67, at 464–65, 480–93, he had attended the Massachusetts Convention as an invited observer and helped lead the opposition, *id.* at 465. Presumably, therefore, he supported Samuel Adams’s proposed amendments, even though he also desired additional ones. *See id.* at 486–89.

<sup>300</sup> Remarks of Gerry (Aug. 17, 1789), *reprinted in Creating the Bill of Rights, supra* note 82, at 182.

<sup>301</sup> *See Creating the Bill of Rights, supra* note 82, at 183–85.

quasi-collective right view of the other clauses of the amendment, have some *right* to do so, and thus Congress could not, as Gerry charged, “*prevent them*” from serving.

After more debate over the conscientious objector clause on August 20, the House added back “in person” at the end and approved the draft.<sup>302</sup> It attached all of the amendments to the end of the Constitution rather than incorporating them, but no substantive change was intended.<sup>303</sup> The right of the people to keep and bear arms was the fifth of the seventeen proposed amendments that the House then sent to the Senate.<sup>304</sup>

An Anti-Federalist who during the ratification debates had written widely published essays as “Centinel” was enraged enough by the House’s failure to restrict federal, and protect state, power that he took up his pen again, as Centinel Revived.<sup>305</sup> He denounced “the partial amendments making [sic] by Congress” and lamented that, although “many of these amendments are very proper and necessary, yet . . . the constitution is suffered to retain powers that may not only defeat their salutary operation, but may, and incontrovertibly will be so decisively injurious as to sweep away every vestige of liberty.” He highlighted the Second Amendment for criticism:

It is remarkable that this article only makes the observation, “that a well regulated militia, composed of the *body* of the people, is the best security of a free state”; it does not ordain, or constitutionally provide for, the establishment of such a one. The absolute command vested by other sections in Congress over the militia, are not in the least abridged by this amendment.<sup>306</sup>

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<sup>302</sup> See *id.* at 198–99. The addition may have been an effort to partially satisfy Representative Scott, by ensuring that Congress could at least require conscientious objectors to provide an equivalent. Unlike Gerry, he objected to the exemption because he worried that citizens, rather than Congress, would abuse it, with the result that “you can never depend upon your militia.” He added, “This will lead to the violation of another article in the constitution, which secures to the people the right of keeping arms, as in this case you must have recourse to a standing army.” *Id.* at 198. While this cryptic and elliptical comment conceivably might be construed to suggest a quasi-collective right, its meaning is far from clear, and we find little probative value in it. The Fifth Circuit in *Emerson* reasonably concluded that Scott’s comment “does not plainly lend support to any of the Second Amendment models,” 270 F.3d at 248, and the Ninth Circuit in *Silveira* did not cite it, see 312 F.3d at 1085–86.

<sup>303</sup> See *Creating the Bill of Rights*, *supra* note 82, at 117–28 (debate of Aug. 13, 1789); *id.* at 197–98 (debate of Aug. 19, 1789).

<sup>304</sup> *Id.* at 37–41.

<sup>305</sup> “The most prolific and one of the best known of the Anti-Federalist essayists was the Centinel, whose essays appeared in the Philadelphia *Independent Gazetteer* and the Philadelphia *Freeman’s Journal* and were widely reprinted.” 2 *Complete Anti-Federalist*, *supra* note 101, at 130. He published twelve essays as Centinel Revived. *Id.*

<sup>306</sup> *Centinel (Revived)*, No. 29 (1789), Phila. Indep. Gazetteer, Sept. 9, 1789, quoted in *Emerson*, 270 F.3d at 255.

Centinel understood the Second Amendment not to constrain Congress's Article I, Section 8 "absolute command" over the militia or otherwise secure any power of the states to maintain one (whether by creating a "right" of states or of the members of their organized militia units), and understood the Amendment's prefatory praise of the militia—a mere "observation"—not to have any operative effect. The reasonable inference is that he viewed the "right of the people to keep and bear arms" as one belonging to individuals.

The Senate reduced the House's proposed amendments to twelve in early September.<sup>307</sup> In so doing, it made three changes in what would become the Second Amendment: (1) deleting "composed of the body of the people," (2) replacing "the best" with "necessary to the," and (3) deleting the conscientious objector clause. It also voted down a motion to insert "for the common defense" immediately after "to keep and bear Arms."<sup>308</sup> The Senate deliberated in secret, and its minutes are conclusory, so it is difficult to discern the reasons for these changes. One could argue that some of them (deletion of the conscientious objector clause and rejection of the "common defense" clause) tend to support the individual right view of the Amendment, although contrary arguments are no doubt possible.<sup>309</sup> One also could argue that deletion of the definition of the militia cuts against the individual right view's reading of the prefatory language, although there, too, a counter-argument is possible.<sup>310</sup> Because of the lack of historical records and the multiple possible explanations, we are reluctant to attribute any material significance to these actions.

We do, however, find it significant that the Senate rejected a motion to add a separate amendment securing state power to organize, arm, and discipline the militias if Congress should "omit or neglect" to do so.<sup>311</sup> Notwithstanding the lack of historical records of the deliberations on this motion, the broader historical

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<sup>307</sup> The Senate combined provisions (such as in creating what became the First and Fifth Amendments) and rejected House provisions regulating appeals to the Supreme Court; applying religion, speech, press, and criminal jury protections to the states; and prohibiting violations of the separation of powers. See 2 Schwartz, *Bill of Rights*, *supra* note 67, at 1145–47 (summarizing changes); compare *Creating the Bill of Rights*, *supra* note 82, at 37–41 (House proposals), with *id.* at 47–49 (Senate).

<sup>308</sup> See *Creating the Bill of Rights*, *supra* note 82, at 39 n.13; 2 Schwartz, *Bill of Rights*, *supra* note 67, at 1153–54 (Sen. Journal).

<sup>309</sup> See Uviller & Merkel, *supra* note 45, 76 Chi.-Kent L. Rev. at 507 (theorizing that vote on common defense clause was prompted by desire to avoid either redundancy or the objection that the amendment failed to protect militia service in defense of a state, as opposed to the "common" national defense). The deletion of the troublesome conscientious objector clause could have been simply because of a desire, as voiced in the House, to leave the matter to Congress's discretion, see, e.g., Remarks of Rep. Benson (Aug. 17, 1789), reprinted in *Creating the Bill of Rights*, *supra* note 82, at 184, without affecting the right one way or the other.

<sup>310</sup> One could argue that the definition was considered superfluous. See 2 Schwartz, *Bill of Rights*, *supra* note 67, at 1145 (observing that Senate in its revisions of the House proposals generally "tighten[ed] up the language of the House version, striking out surplus wording and provisions."); Part II.C.2–4 (discussing meaning of "Militia" at the time).

<sup>311</sup> 2 Schwartz, *Bill of Rights*, *supra* note 67, at 1152 (Sen. Journal).

context suggests that, had Congress sought to secure the states' ability to maintain organized militia units, adopting this provision is how it would have done so. It is hard to ascribe this vote to a view that the proposed amendment was redundant with the right of the people to keep and bear arms: Not only are the texts of the two provisions markedly different, but also, as explained in the previous subpart, the Virginia and North Carolina Ratifying Conventions (from which the rejected language was directly taken) had made distinct proposals, one covering the right to arms and the other covering state power over the militia (the Pennsylvania Minority also had done this). In addition, the Senate was even more Federalist than the House (Lee and Grayson of Virginia being the only Anti-Federalists among the 22 senators).<sup>312</sup> As already noted, the Federalists were determined to avoid amendments affecting the federal-state balance of power and instead to focus on individual rights. If senators had thought that what became the Second Amendment had the effect of this rejected provision, one would have expected them to have refused to approve it as well. Finally, the two Anti-Federalist senators acknowledged that their efforts to obtain amendments affecting the federal-state balance had failed. Senator Lee, like Centinel, complained, in a letter to Patrick Henry, that the amendments were inadequate for "securing the due Authority of the States."<sup>313</sup> Senators Lee and Grayson jointly informed the Virginia legislature of their failure to secure the "Radical Amendments proposed by the Convention."<sup>314</sup> Thus, the Senate continued the House's approach—rejecting attempts to restrict congressional powers or augment state powers, while securing individual rights in the hope of creating a national consensus in favor of the new government.

On September 24, 1789, a conference committee agreed to some changes in the Senate's proposed amendments, but there was no change in (or effort to change) the Senate's version of what became the Second Amendment. Congress, through the President, then sent the twelve proposed amendments to the then-eleven states for ratification and to North Carolina and Rhode Island (which still had not ratified the Constitution).<sup>315</sup> The records of the state ratifying conventions are sparse and do not appear to provide any significant material concerning the meaning of the

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<sup>312</sup> See *Creating the Bill of Rights*, *supra* note 82, at xii; Letter from Madison to Jefferson (Mar. 29, 1789), *reprinted in id.* at 225.

<sup>313</sup> Letter from Lee to Henry (Sept. 14, 1789), *reprinted in id.* at 295. The Senate also, like the House, had rejected a proposal to append to what became the Second Amendment a supermajority requirement for peacetime standing armies, a provision to help ensure that Congress would depend on and therefore provide for the militia. 2 Schwartz, *Bill of Rights*, *supra* note 67, at 1149 (Sen. Journal); see *Creating the Bill of Rights*, *supra* note 82, at 38–39 n.13.

<sup>314</sup> Letter from Lee and Grayson to the Speaker of the Virginia House of Delegates (Sept. 28, 1789), *reprinted in Creating the Bill of Rights*, *supra* note 82, at 299.

<sup>315</sup> See *id.* at 49–50 (Conference Committee Report and House Resolution); *id.* at 296–98 (various letters of Sept. 1789, including by Madison, detailing concerns with certain Senate revisions but not mentioning Second Amendment); 2 Schwartz, *Bill of Rights*, *supra* note 67, at 1171–73 (regarding presidential transmittal).

Second Amendment right.<sup>316</sup> The states approved ten of the twelve proposed amendments, and in March 1792, Secretary of State Jefferson officially declared the Bill of Rights ratified.<sup>317</sup>

The history in this subpart of the immediate development of the Second Amendment reveals a right consistent with, and developed from, the individual right to arms that had been inherited from England, recognized and invoked in revolutionary America, and codified to various extents in early state declarations of rights. In addition, the early states prized a well-regulated citizen militia, as some of their declarations recognized, and understood the individual right to arms to facilitate such a militia. The Second Amendment, following the lead of several of the ratifying conventions, reflects the contemporaneous understanding of this relationship; in so doing, it grants the right to “the people,” not to the “Militia” (much less to members of select militia units), or to the “State.” Nor does the history support limiting the right secured by the Amendment to any of these entities. Indeed, those who wanted to ensure that the states could have fully functioning militias proposed a separate amendment, expressly protecting state power. Their proposals failed.<sup>318</sup> Thus, the history of the Amendment, like its text, indicates that the Second Amendment’s “right of the people to keep and bear Arms” is not collective or quasi-collective but rather is a personal right that belongs to individuals.

#### **IV. The Early Interpretations**

Our analysis of the Second Amendment’s text and history in the two preceding parts of this memorandum is supported by the views of those who first interpreted the Amendment. In the generations immediately following its ratification, the three leading commentators to consider the Second Amendment each recognized that its right of the people to keep and bear arms belonged to individuals, not to states and not just to members of militias (whether of organized, select militia units or even of the citizen militia). Nearly all of the discussions of the antebellum courts, including in the leading cases, understood the right in the same way, whether they were considering the Second Amendment or similar provisions in

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<sup>316</sup> See 2 Schwartz, *Bill of Rights*, *supra* note 67, at 1171–72 (“[W]e know practically nothing about what went on in the state legislatures during the ratification process” and “[e]ven the contemporary newspapers are virtually silent.”); *Emerson*, 270 F.3d at 255 (without comment, omitting discussion of ratification); *Silveira*, 312 F.3d at 1086 (same).

<sup>317</sup> 2 Schwartz, *Bill of Rights*, *supra* note 67, at 1171, 1203. One of the two not then ratified was ratified in 1992 as the Twenty-Seventh Amendment, which relates to congressional pay. The other addressed the size of the House.

<sup>318</sup> And even if one believes, contrary to the historical record, that Anti-Federalists’ concerns about the militia were resolved in their favor, the Anti-Federalists’ insistence on the superiority of a citizen militia to a select militia, noted at the beginning of Part III.C, would lead to the understanding of the Amendment’s prefatory clause that we set out in Part II.C, an understanding that is, as we explained, fully consistent with the individual right view of the Second Amendment.

state constitutions. This early understanding of a personal right continued at least through Reconstruction. The modern alternative views of the Second Amendment did not take hold until 1905, well over a century after the Amendment had been ratified.

### **A. The First Commentators**

In the first few decades after the Second Amendment was drafted and ratified, each of the three leading commentators on the Constitution addressed it: St. George Tucker, William Rawle, and Joseph Story. Each agreed that it protects an individual right. Less prominent early commentators also concurred with this interpretation.

Tucker, a judge and law professor from Virginia, published in 1803 an edition of Blackstone's *Commentaries* to which he had added annotations and essays explaining the relation of American law, including the new Constitution, to England's. Tucker's Blackstone quickly became the leading American authority on both Blackstone and American law.<sup>319</sup>

Tucker addressed the Second Amendment at several points. He first did so, repeatedly, in his introductory *View of the Constitution of the United States*. He tied the federal right, as Blackstone had the English one, to the individual, natural right of self-defense and to the freedom of the state. After quoting the Amendment, he wrote:

This may be considered as the true palladium of liberty . . . . The right of self defence is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.<sup>320</sup>

He condemned the use of the game laws in England as a pretext to disarm ordinary people—the “farmer, or inferior tradesman, or other person not qualified to kill game.”<sup>321</sup> And he grouped the Second Amendment right with those of the First, confirming that all belonged to individuals:

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<sup>319</sup> See Clyde N. Wilson, Forward, in St. George Tucker, *View of the Constitution of the United States, with Selected Writings* at viii–ix (1999); Paul Finkelman & David Cobin, An Introduction to St. George Tucker's *Blackstone's Commentaries*, in 1 Tucker's Blackstone, *supra* note 60, at v–xii; 1 *id.*, Editor's Preface at v.

<sup>320</sup> 1 Tucker's Blackstone, *supra* note 60, Note D, at 300 (ellipsis in original).

<sup>321</sup> *Id.*

If, for example, a law be passed by congress, prohibiting the free exercise of religion, according to the dictates, or persuasions of a man's own conscience; or abridging the freedom of speech, or of the press; or the right of the people to assemble peaceably, or to keep and bear arms; it would, in any of these cases, be the province of the judiciary to pronounce whether any such act were constitutional, or not; and if not, to acquit the accused . . . .<sup>322</sup>

Second, in annotating Blackstone's description, in Book I, Chapter 1, of the individual English subject's right to have and use arms for self-defense (discussed above in Part III.A), Tucker praised the Second Amendment "right of the people" for being "without any qualification as to their condition or degree, as is the case in the British government" (under England's Bill of Rights) and again denounced the game laws, by which "the right of keeping arms is effectually taken away from the people of England."<sup>323</sup> Finally, in a note to one of Blackstone's (critical) discussions of the game laws, Tucker once more attacked them, because "it seems to be held" that no one but the very rich has "any right to keep a gun in his house" or "keep a gun for their defence," the result being that "the whole nation are completely disarmed, and left at the mercy of the government," and "the mass of the people" are kept "in a state of the most abject subjection." By contrast, "in America we may reasonably hope that the people will never cease to regard the right of keeping and bearing arms as the surest pledge of their liberty."<sup>324</sup>

In all of these discussions, the right belonged to individuals—to persons availing themselves of the natural, individual "right of self defence," to the "accused" seeking judicial review of a violation of the Second Amendment, and to "the mass" of ordinary people able to defend themselves because protected by the Second Amendment from class-based pretexts for disarmament. Tucker understood both the English and American rights to arms to belong to individuals, and he thought the latter more secure and broad-based.

Nowhere did Tucker suggest that the right of the people to keep and bear arms depended on a person's enrollment and exercise in the citizen militia (much less his membership in an organized, select militia unit) or that it was a "right" that belonged to state governments. He did elsewhere, in discussing the Militia Clauses, point out that the Second Amendment eliminated "all room for doubt, or

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<sup>322</sup> *Id.* at 357; *see id.* at 315–16 (explaining that, whereas in England, "the game-laws, as was before observed, have been converted into the means of disarming the body of the people," and statutes have restricted assemblies, the Constitution will not "permit any prohibition of arms to the people; or of peaceable assemblies by them"); *id.* at 289 (describing hypothetical law "prohibiting any person from bearing arms" as violating the Second Amendment).

<sup>323</sup> 2 *id.* at \*143–44 & nn. 40–41. *See also id.* at \*145 n.42 (again criticizing game laws).

<sup>324</sup> 3 *id.* at \*414 n.3; *see also* Parts III.A (discussing right to arms in England) & III.B.2 (discussing doubts whether the relaxation of English game laws in 1700s succeeded as a practical matter in enabling commoners to keep arms).

uneasiness” on whether the federal government could prohibit states from simply providing arms for their militias (doubt he rightly found questionable given that the original Constitution left a concurrent arming power in the states).<sup>325</sup> Tucker did not suggest here that he thought the Amendment had only this effect, and his other discussions confirm that he did not so understand it.

William Rawle of Pennsylvania published his *View of the Constitution of the United States of America* in 1825, with a second edition appearing in 1829. After having turned down President Washington’s offer to be the first attorney general, he had served in the Pennsylvania Assembly when it ratified the Bill of Rights. His commentary, like Tucker’s, gained wide prominence.<sup>326</sup>

Rawle analyzed the Second Amendment in a chapter entitled “Of the Restrictions on the Powers of Congress . . . [.] Restrictions on the Powers of States and Security to *the Rights of Individuals*,” by which he meant, respectively, Article I, Section 9; Article I, Section 10; and the first eight amendments of the Bill of Rights.<sup>327</sup> He started with the Second Amendment’s preface, giving to it, including the word “Militia,” precisely the sense and significance that emerges from our analysis above, and making clear that the substantive right belonged to the ordinary citizen:

In the second article, it is declared, that *a well regulated militia is necessary to the security of a free state*; a proposition from which few will dissent. Although in actual war, the services of regular troops are confessedly more valuable; yet, while peace prevails, and in the commencement of a war before a regular force can be raised, the militia form the palladium of the country. . . . That they should be well regulated, is judiciously added. . . . The duty of the state government is, to adopt such regulations as will tend to make good soldiers with the least interruptions of the ordinary and useful occupations of civil life. . . .

The corollary, from the first position, is, that *the right of the people to keep and bear arms shall not be infringed*.

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<sup>325</sup> 1 *id.* at 273. Tucker thought the federal powers in Article I, Section 8, Clause 16, to provide for “organizing” and “disciplining” the militia were exclusive, *id.* at 180–81, but that states retained “concurrent, though perhaps subordinate” powers to provide for “arming” their militias and “to call them forth when necessary for their internal defence,” *id.* at 182, 183. His only other reference to the Second Amendment in connection with the militia was in a note to Blackstone’s discussion of the militia, in which Tucker collected all references in the Constitution to the militia, along with the Third Amendment, Virginia laws, and the federal Militia Act. 2 *id.* at \*409 n.1.

<sup>326</sup> See Hardy, *supra* note 33, 9 Harv. J.L. & Pub. Pol’y at 613. Rawle did agree to be United States Attorney for the District of Pennsylvania. See, e.g., *United States v. Fries*, 3 U.S. (3 Dall.) 515, 517 (C.C.D. Pa. 1799).

<sup>327</sup> William Rawle, *A View of the Constitution of the United States of America* 115 (2d ed. 1829; reprint 1970) (font altered; emphasis added).

The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.<sup>328</sup>

Both Rawle's language—the Amendment's prohibition "is general" and protects the arms of "the people"—and his view of the Second Amendment as applying to the states and *restricting* their power indicate that he saw the right as individual, not as collective or quasi-collective.

Two additional points further show that Rawle viewed the right as belonging to individuals. Like Tucker, he favorably contrasted the right of the people that the Second Amendment secured with the more selective individual right in England under the aristocratic game laws, including a summary of Blackstone's critique of those laws. In addition, he expressly recognized, as had Blackstone, Tucker, and, in varying degrees, the Pennsylvania Minority, Samuel Adams, and the New Hampshire Ratifying Convention, that the right provided no warrant to breach the peace, including by inciting reasonable fear of a breach.<sup>329</sup> This recognition indicates an individual right view because there is no need for ordinary criminal law to oversee either the actions of states in regulating their militias or the bearing of arms by members of a state's militia in connection with their service and under state regulation.

Rawle further explained the individual right view's understanding of the Second Amendment preface when discussing the President's limited power to command the militia. Although not mentioning the Amendment expressly, he noted: "In a people permitted and accustomed to bear arms, we have the rudiments of a militia, which properly consists of armed citizens, divided into military bands, and instructed at least in part in the use of arms for the purposes of war."<sup>330</sup> Thus, the "people" of the country, as individuals, keep and bear arms for private purposes; they also form the militia; and the former facilitates the latter, but only as a rudiment. That is why the individual right is a "corollary" from the need for a militia.

The same view appears in the influential 1833 *Commentaries on the Constitution of the United States* of Supreme Court Justice and law professor Joseph Story,

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<sup>328</sup> *Id.* at 125–26.

<sup>329</sup> *Id.* at 126. Regarding Blackstone, see Part III.A above. For Tucker's annotations of some of Blackstone's discussions of improper uses of arms, see 5 Tucker's Blackstone, *supra* note 60, at \*126, \*142–49, \*175. Regarding the Pennsylvania Minority, Adams, and New Hampshire, see Part III.C.1 above.

<sup>330</sup> Rawle, *View of the Constitution*, *supra* note 327, at 153. Significantly, in separately discussing the Militia Clauses of Article I, Section 8, Rawle made no mention of the Second Amendment. *Id.* at 111–12.

as well as in his later *Familiar Exposition* of the Constitution. The *Commentaries* appeared first in a three-volume set and then, a few months later, in a one-volume abridgement by Story (the “*Abridgement*”).<sup>331</sup>

Story devoted a chapter of his *Abridgement* to the Bill of Rights. Before turning to its provisions, he recounted the debate over whether to add one and identified several purposes, all related to individual rights: (1) to prevent powers granted to the government from being exercised in a way “dangerous to the people”; (2) as part of “the muniments of freemen, showing their title to protection,” to ensure against an “extravagant or undue extention of” powers granted; and (3) to protect minorities.<sup>332</sup> He then singled out those amendments that did not relate to judicial procedure (the First, Second, Third, Fourth, Eighth, Ninth, and Tenth) as those addressing “subjects properly belonging to a bill of rights.”<sup>333</sup>

With regard to the Second Amendment, he first explained the importance of the militia for “a free country,” including as a check on “domestic usurpations of power,” and the hazards “for a free people” of keeping up “large military establishments and standing armies in time of peace.” He linked these policies to the right: “The right of the citizens to keep, and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.”<sup>334</sup> In the unabridged version, he cited Tucker, Rawle, and the House of Representatives’ first day of debate on the Amendment in support of this sentence.<sup>335</sup>

By paraphrasing the “right of the people” as the “right of the citizens”—not of states or members of their militias—as well as by citing Tucker and Rawle’s discussions (including borrowing from Tucker’s “palladium” language), Story left no doubt that he considered the right to belong to individuals. He reinforced this point in an additional paragraph in the unabridged version, citing both Blackstone’s discussion of the “similar provision” in England—clearly an individual right, as explained above—and Tucker’s discussion of what Story called the “defensive privilege” there.<sup>336</sup> In his *Familiar Exposition*, Story began his discus-

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<sup>331</sup> Ronald D. Rotunda & John E. Nowak, Introduction, in Story, *Abridgement*, *supra* note 66, at xi–xiv.

<sup>332</sup> *Id.* §§ 980–982, at 696–97.

<sup>333</sup> *Id.* § 984, at 698; *see id.* §§ 985–1011, at 698–714.

<sup>334</sup> *Id.* § 1001, at 708.

<sup>335</sup> 3 Story, *Commentaries*, *supra* note 75, § 1890, at 746 n.1. In *United States v. Miller*, 307 U.S. 174, 182 n.3 (1939), the Supreme Court included this passage (from a later edition) in a string citation.

<sup>336</sup> 3 Story, *Commentaries*, *supra* note 75, § 1891, at 747. In a separate chapter, the full *Commentaries* also included an extended discussion of the Anti-Federalist charges leveled against the Militia Clauses, including the charge that the federal militia powers would be exclusive (which Story found unpersuasive). Story alluded to the failure of proposals explicitly to protect state militia powers. *Id.* §§ 1198–1202, at 83–87.

sion of the Amendment with an even more explicit statement: “One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia.”<sup>337</sup>

Thus Story, like Tucker, Rawle, and others, recognized that the right that the Second Amendment secured was an individual one. He also saw, as they had, that this personal right was necessary for ensuring a well-regulated militia of the people. But he likewise recognized, consistent with the individual right view, that such a right was not sufficient for ensuring such an entity, wondering how it would be “practicable to keep the people duly armed without some organization,” and lamenting the decline of militia discipline.<sup>338</sup>

Less prominent commentators shared Tucker, Rawle, and Story’s view of the Second Amendment as securing an individual right. Most significant of these was probably Henry Tucker (son of St. George). In an 1831 commentary, he explained:

The right of bearing arms—which with us is not limited and restrained by an arbitrary system of game laws as in England; but is practically enjoyed by every citizen, and is among his most valuable privileges, since it furnishes the means of resisting as a freeman ought, the inroads of usurpation.<sup>339</sup>

He also noted that the right inherited from England and expounded by Blackstone “is secured with us by” the Second Amendment.<sup>340</sup> And Jonathan Elliot, in his record of the ratification debates first published in the 1830s, provided an index of the Constitution that, under the heading “*Rights of the citizen* declared to be,” listed each of the rights of the first nine amendments of the Bill of Rights, including “To keep and bear arms.”<sup>341</sup> He grouped the right secured by the Second Amendment with the unquestionably individual rights secured by its neighbors. There was no entry in the index for the militia or its members, aside from reference to the congressional powers in Article I, Section 8, and none of his entries regarding the states included reference to the militia or the Second Amendment.<sup>342</sup> Thus, these early commentators were all consistent in recognizing that the Second

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<sup>337</sup> Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 450, at 319 (1840; reprint 1986).

<sup>338</sup> Story, *Abridgement*, *supra* note 66, § 1001, at 708–09.

<sup>339</sup> Henry St. George Tucker, *Commentaries on the Laws of Virginia* 43 (1831).

<sup>340</sup> *Id.*

<sup>341</sup> *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* xv (Jonathan Elliot ed., 2d ed. 1836; reprint 1987).

<sup>342</sup> For additional antebellum commentators, see David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. Rev. 1359, 1399–1403, 1435–41; *see also id.* at 1397–98 (discussing Henry Tucker).

Amendment secures an individual right. They did not even mention possible alternative views, whether involving a collective or a quasi-collective “right.”

## **B. The First Cases**

Like the commentators, the early case law also treated the Second Amendment as securing a right of individuals, not a right of governments or those in its service. Without taking any position on the correctness of the courts’ holdings or the constitutionality, under the Second Amendment, of any particular limitations on owning, carrying, or using firearms, we find it significant that these decisions consistently understood the right to be an individual one. The earliest cases, although not numerous, consistently recognized that the right to “bear” arms belonged to individuals, just as the right to “keep” them did. Judicial treatment became more common beginning in the 1840s, mostly because of new prohibitions on carrying weapons concealed. The courts upheld these prohibitions (some courts applying the Second Amendment and some applying similar state provisions), but in so doing they all recognized an individual right to arms: All of the decisions recognized an individual right to keep private arms; nearly all, including the leading cases, recognized a right of individuals to “bear” those arms for private purposes; and all recognized some manner of individual right to bear them. Most notably, the Supreme Court of Georgia twice unanimously ruled in favor of individuals on the basis of the Second Amendment.

### **1. Cases Before 1840**

The first of the early cases is *Houston v. Moore*, in 1820. The Supreme Court, in upholding Pennsylvania’s power to try a militiaman for failing to report for federal service in the War of 1812, recognized that states had concurrent power to regulate their militias at least when the militias were in the service of their state or in the absence of congressional regulation. Yet it did not mention the Second Amendment. Justice Story, in dissent, also recognized the concurrent power, and he noted that the Second Amendment was probably irrelevant to the question.<sup>343</sup> As we explained above in Part III.C.1, the Anti-Federalists who claimed to fear that the federal militia powers would not allow a concurrent state jurisdiction did not rely on the proposals for a right to arms to resolve their concern, but rather proposed separate amendments (which failed to pass). It appears that the Court in *Houston* similarly recognized that the Second Amendment did not guard state power to maintain militias, whether by creating a collective right of states or a quasi-collective right of militiamen to vindicate state power. Otherwise, one would

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<sup>343</sup> *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 16–17, 21–22 (1820) (plurality opinion of Washington, J.); see *id.* at 34–36 (Johnson, J., concurring); *id.* at 50–53 (Story, J., dissenting). Story dissented on the ground that the militia law granted enforcement authority exclusively to federal courts. *Id.* at 71–72.

expect the Court to have discussed it. Thus, *Houston*, although far from conclusive, lends some support to an individual right view.

Second, in *Bliss v. Commonwealth* (1822), in what appears to be the first judicial interpretation of the right to bear arms in America, a divided highest court of Kentucky applied that state's constitutional protection of "the right of the citizens to bear arms in defense of themselves and the state," first adopted in 1792, to void a ban on wearing certain weapons concealed.<sup>344</sup> The state had argued that the ban merely restricted the manner of exercising the right. The court, although not citing authority, gave two primary reasons for rejecting this argument: (1) the right in 1792 included carrying weapons concealed, and (2) to recognize this one exception would leave no principled basis to reject others, eviscerating the right.<sup>345</sup> The court's specific holding was rejected thereafter—by courts<sup>346</sup> and by the people of Kentucky, who in their 1850 constitution added a clause allowing laws to prevent carrying concealed arms.<sup>347</sup> But the holding was rejected, not on the ground that it improperly recognized a right of individuals to "bear arms" (Kentucky's provision remained otherwise unchanged), but rather on the ground that *Bliss* erred in determining the right's scope. Thus *Bliss* confirms the individual nature of the right.

Third, several early references to the right or to "bearing arms" indicate that courts viewed the right as an individual one, or at least that an individual carrying weapons and not in militia service could be said to "bear arms." A Virginia appellate court in 1824, discussing that state's restrictions on the rights of free blacks—"many of which are inconsistent with the letter and spirit of the Constitution, both of this State and of the United States"—cited the restriction "upon their right to bear arms."<sup>348</sup> That the restriction involved their rights as individuals is evident from Tucker's summary of the Virginia laws.<sup>349</sup> In an 1829 libel case, the Supreme Court of Michigan (then a territory) drew a parallel between the freedoms of speech and press and the right of the people to bear arms to explain that

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<sup>344</sup> 12 Ky. (2 Litt.) 90, 1822 WL 1085. The dissenting judge did not issue an opinion. *See id.* at \*4.

<sup>345</sup> *Id.* at \*2.

<sup>346</sup> The first court to depart from *Bliss*'s holding, the Indiana Supreme Court eleven years later in *State v. Mitchell*, 3 Blackf. 229, 1833 WL 2617, at \*1, did not cite its neighboring court or otherwise explain itself, the entire opinion being as follows: "It was held in this case, that the statute of 1831, prohibiting all persons, except travelers, from wearing or carrying concealed weapons, is not unconstitutional." We discuss the later antebellum cases in the next subpart.

<sup>347</sup> *See* Ky. Const. art. XIII, § 25 (1850), reprinted in 3 *Federal and State Constitutions*, *supra* note 78, at 1314.

<sup>348</sup> *Aldridge v. Commonwealth*, 4 Va. (2 Va. Cas.) 447, 1824 WL 1072, at \*3 (Va. Gen. Ct.).

<sup>349</sup> 5 Tucker's Blackstone, *supra* note 60, at \*175 n.17, ¶ 7 (listing as among the "offences against the public police, or [e]conomy," the restriction against "any" black or mulatto "keeping or carrying any gun-powder, shot, club, or other weapon," including a "gun"). *See also* *Waters v. State*, 1 Gill. 302, 1843 WL 3024 (Md.) (explaining, with regard to free blacks, that "laws have been passed to prevent their migration to this State; to make it unlawful for them to bear arms; to guard even their religious assemblages with peculiar watchfulness.").

individual rights are not unlimited: “The constitution of the United States also grants to the citizen the right to keep and bear arms. But the grant of this privilege cannot be construed into the right in him who keeps a gun to destroy his neighbor.”<sup>350</sup> And in a jury instruction while riding circuit in 1833, in a case unrelated to the militia, U.S. Supreme Court Justice Baldwin included the Amendment in a list of potentially relevant individual rights.<sup>351</sup>

Last of the earliest cases is the 1833 decision of the Supreme Court of Tennessee in *Simpson v. State*.<sup>352</sup> The question was the validity of a boilerplate indictment alleging that the defendant had appeared in a “public street and highway . . . arrayed in a warlike manner” and then “to the great terror and disturbance of divers good citizens . . . an affray did make . . . against the peace and dignity of the state.”<sup>353</sup> The court held the indictment invalid because it alleged neither fighting (an element of “affray”) nor any other act likely to have caused public terror and indictable at common law. The court reached this conclusion first by considering the common law, particularly as set out by Blackstone. But because there was some uncertainty regarding the common law, the court also relied on the 1796 Tennessee Constitution, which provided “that the freemen of this state have a right to keep and to bear arms for their common defence.”<sup>354</sup> This right eliminated any doubt whether merely appearing in public armed could create “terror” and thus be criminal: “By this clause of the constitution, an express power is given and secured to all the free citizens of the state to keep and bear arms for their defence, without any qualification whatever as to their kind or nature.”<sup>355</sup> The court recognized that individuals could “bear arms” for private purposes, just as they could “keep” them, and included self-defense within “their common defence.” Thus, in the first four decades after the Founding, the courts were consistent in recognizing that the right to keep and bear arms was a right of individuals,

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<sup>350</sup> *United States v. Sheldon*, 5 Blume Sup. Ct. Trans. 337, 1829 WL 3021, at \*12 (Mich. Terr.). See also *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304, 338 (1825) (invoking right to keep arms to draw same analogy).

<sup>351</sup> *Johnson v. Tompkins*, 13 F. Cas. 840, 850 (C.C.E.D. Pa. 1833) (No. 7,416).

<sup>352</sup> 13 Tenn. (5 Yer.) 356, 1833 WL 1227.

<sup>353</sup> 1833 WL 1227, at \*1.

<sup>354</sup> *Id.* For more regarding the relevant common law, see the discussion in *State v. Huntly*, 25 N.C. (3 Ired.) 418, 1843 WL 891, at \*2–3 (surveying common law and noting “that the carrying of a gun *per se* constitutes no offence”). See also *State v. Langford*, 10 N.C. (3 Hawks) 381, 1824 WL 380; 4 William Blackstone, *Commentaries* \*149; 1 Hawkins, *Pleas of the Crown*, *supra* note 177, ch. 63, § 9, at 136. An English case that the court cited in *Huntly*, predating the English Declaration of Rights, had construed a seemingly restrictive medieval statute as only punishing “people who go armed to terrify the king’s subjects,” not all who go armed. *Sir John Knight’s Case*, 87 Eng. Rep. 75, 76, 3 Mod. Rep. 117 (K.B. 1686). The court recognized that “now there be a general connivance to gentlemen to ride armed for their security,” such that violating the statute required riding “*malo animo*.” *Id.*, 90 Eng. Rep. 330, 330, Comberbach Rep. 38.

<sup>355</sup> 1833 WL 1227, at \*1.

allowing both the keeping of private arms and the bearing of them for private purposes.

## 2. Cases From 1840 to the Civil War

The leading case from the antebellum period on the right to bear arms, and the first major decision, was *State v. Reid* in 1840. The Supreme Court of Alabama unanimously upheld the state's new ban on carrying guns or knives secretly, finding no violation of the provision in the state's 1819 constitution that "[e]very citizen has a right to bear arms, in defence of himself and the State."<sup>356</sup> In so doing, the court recognized that the provision's right to "bear arms" was a right of an individual, who could bear them to facilitate his self-defense. The court first looked to the origins of the right in the "provisions in favor of the liberty of the subject" in the English Declaration of Rights. Quoting the right of subjects to have arms for their defense, the court explained: "The evil which was intended to be remedied by the provision quoted, was a denial of the right of Protestants to have arms for their defence, and not an inhibition to wear them secretly."<sup>357</sup>

The court then adopted the state's factual argument that carrying weapons concealed did not facilitate self-defense but rather served the purpose of aggression and breaching the peace. The court elaborated in explaining the limits of the state's power to enact laws regulating "the manner in which arms shall be borne":

A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional. But a law which is intended merely to promote personal security, and to put down lawless aggression and violence, and to that end inhibits the wearing of certain weapons, in such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others, does not come in collision with the constitution.<sup>358</sup>

The court thus rejected *Bliss*'s holding: "[The constitution] authorizes him to bear them for the purposes of defending himself and the State, and it is only when carried openly, that they can be efficiently used for defence."<sup>359</sup> If the need for defense were immediate, "there can be no necessity for concealing the weapon," and if it were not immediate, there were legal processes for securing protection. If

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<sup>356</sup> 1 Ala. 612, 1840 WL 229, at \*2.

<sup>357</sup> 1840 WL 229, at \*2.

<sup>358</sup> *Id.* at \*3.

<sup>359</sup> *Id.* at \*5–6.

a defendant could prove that it was “indispensable to the right of defence” for him to conceal his weapon, the court might construe the statute not to apply, but Mr. Reid had not done so.<sup>360</sup>

Eighteen years later, the same court in *Owen v. State* reaffirmed *Reid* in recognizing the constitutionality of a similar statute (the legislature, perhaps prompted by *Reid*, had added an exception for those threatened with or reasonably fearing attack). In so doing, the court made explicit what had been implicit in *Reid*—that “carries” in the statute “was used as the synonym of ‘bears.’”<sup>361</sup>

Soon after *Reid*, the Supreme Court of Georgia, in *Nunn v. State*, relied on *Reid*, as well as *Bliss*, in unanimously reversing a conviction for *openly* carrying a pistol. The court applied the Second Amendment, holding “that so far as the act . . . seeks to suppress the practice of carrying certain weapons *secretly*, . . . it is valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void*.”<sup>362</sup> As had *Reid*, *Nunn* looked for guidance to the right to have and use arms in England. The court viewed that right, the right of the Second Amendment, and the rights protected by the states’ constitutions as all securing a personal right of individuals: “When, I would ask, did any legislative body in the Union have the right to deny to its citizens the privilege of keeping and bearing arms in defence of themselves and their country?” Likewise, “the Constitution of the United States, in declaring that the right of the people to keep and bear arms, should not be infringed, only reiterated a truth announced a century before, in the act of 1689.”<sup>363</sup> This “right of the people” was just as “comprehensive” and “valuable” as those in the First, Fourth, Fifth, and Sixth Amendments.<sup>364</sup>

Like Rawle and Story, the *Nunn* court recognized the harmony between the Second Amendment’s individual right and its preface: “[O]ur Constitution assigns as a reason why this right shall not be interfered with or in any manner abridged, that the free enjoyment of it will prepare and qualify *a well-regulated militia*, which are necessary to the security of a free State.” More broadly:

The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every descrip-

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<sup>360</sup> *Id.* at \*6–7; *see id.* at \*1.

<sup>361</sup> 31 Ala. 387, 1858 WL 340, at \*1, \*2.

<sup>362</sup> 1 Ga. (1 Kelly) 243, 1846 WL 1167, at \*11. Georgia’s constitution did not expressly protect the right to arms. The court alluded to *Barron v. Mayor & City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), which held that the Takings Clause of the Fifth Amendment did not apply to the states and reasoned that none of the Bill of Rights did, but rejected it because of the court’s own precedent, the Second Amendment’s broad, non-restrictive language, and the fundamental importance of the right. 1846 WL 1167, at \*9–10.

<sup>363</sup> *Id.* at \*8.

<sup>364</sup> *Id.* at \*10.

tion, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State.<sup>365</sup>

The preface's reference to the militia as "necessary to the security of a free State" reinforced this understanding and helped convince the court that the Amendment also restricted the states: "If a well-regulated militia is *necessary* to the *security* of the State of Georgia and of the United States, is it competent for the General Assembly to take away this security, by disarming the people?" The right lay "at the bottom of every free government," state or federal.<sup>366</sup> As had Rawle, the court in *Nunn*, by concluding that the Amendment *restricted* the powers of the states, confirmed its view that the Amendment did not protect the powers of the states but rather protected the rights of their individual citizens.

Fifteen years later, the same court reported that *Nunn* had "been constantly adhered to," and unanimously applied it to reverse a jury instruction that, for a weapon to be carried openly, it had to be *entirely* uncovered. Because such carrying was "impossible," such an interpretation "would . . . prohibit the bearing of those arms altogether."<sup>367</sup>

The Louisiana Supreme Court took the same view of the Second Amendment as an individual right in a series of cases in the 1850s. In *State v. Chandler*, a murder defendant had sought an instruction that carrying weapons "either concealed or openly" could not be a crime consistent with the Constitution. The court affirmed the denial of the instruction. Like *Reid* and *Nunn*, the court saw no factual link between carrying weapons concealed and self-defense. But, also like them, it viewed open carrying of arms differently: "This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country."<sup>368</sup> Six years later, the court upheld a conviction for carrying a concealed weapon, finding no Second Amendment violation because "[t]he arms there spoken of are such as are borne by a people in war, or at least carried openly."<sup>369</sup> And two years after

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<sup>365</sup> *Id.*

<sup>366</sup> *Id.* at \*10, \*9.

<sup>367</sup> *Stockdale v. State*, 32 Ga. 225, 1861 WL 1336, at \*3. The Texas Supreme Court before the Civil War appears also to have viewed the Second Amendment as applying to the states and including an individual right to own arms and use them for self-defense and perhaps hunting. See *Choate v. Redding*, 18 Tex. 579, 1857 WL 5009, at \*2; *Cockrum v. State*, 24 Tex. 394, 1859 WL 6446, at \*6–8. In the latter case, in which the court rejected a constitutional challenge to a sentencing enhancement for homicide with a bowie knife, the court did not cite any authority, but the defendant had cited *Nunn*, *Reid*, *Bliss*, and *Mitchell*. 1859 WL 6446, at \*3.

<sup>368</sup> 5 La. Ann. 489, 1850 WL 3838, at \*1; see *id.* at \*2 (discussing self-defense).

<sup>369</sup> *State v. Smith*, 11 La. Ann. 633, 1856 WL 4793, at \*1.

that, the same court cited these decisions in upholding another such conviction, again treating the right as belonging to individuals and understanding “carry” to be synonymous with “bear”: “The statute in question . . . is a measure of police prohibiting only *a particular mode* of bearing arms which is found dangerous to the peace of society.”<sup>370</sup>

Two other state court cases of this later antebellum period merit special mention. The first and more significant is *Aymette v. State*,<sup>371</sup> the second, *State v. Buzzard*.<sup>372</sup> In both, the court’s holding was unremarkable—that bans on carrying weapons concealed were constitutional. But the courts’ rationales were novel. While still recognizing a right to keep and to bear arms that belonged to individuals, these decisions sharply restricted the purposes for which arms could be borne. Unlike *Reid* and *Numm*, neither case was cited until several years after the Civil War (and then usually just for their holdings), but *Aymette* acquired some prominence thereafter, and *Buzzard* is notable for one judge’s separate opinion somewhat foreshadowing the collective and quasi-collective right views.

In *Aymette*, the Tennessee Supreme Court applied that state’s 1834 Constitution, which provided “that the free white men of this State have a right to keep and bear arms for their common defence.” (The only difference from the provision discussed in *Simpson* was the change of “freemen” to “free white men.”<sup>373</sup>) In upholding the defendant’s conviction for carrying a concealed bowie knife, the court limited the state right to “bear arms” to actions done “by the people in a body for their common defense.”<sup>374</sup> Some have relied on *Aymette*’s reasoning in arguing against the individual right view of the Second Amendment. The Ninth Circuit in *Silveira*, for example, overlooking all of the antebellum cases discussed above, described *Aymette* as “the most significant judicial decision to construe the term ‘bear arms’” and as concluding that the phrase “referred to the performance of a military function.”<sup>375</sup> *Silveira* particularly relied on *Aymette*’s statement that “[a] man in pursuit of deer, elk and buffaloes might carry his rifle every day for forty years, and yet it would never be said of him that he had borne arms.”<sup>376</sup> Fairly read, however, *Aymette* does not contravene an individual right view of the Second Amendment.

First, even assuming for the sake of argument that *Aymette* read the Tennessee Constitution not to secure any individual right to bear arms, the decision has two

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<sup>370</sup> *State v. Jumel*, 13 La. Ann. 399, 1858 WL 5151, at \*1.

<sup>371</sup> 21 Tenn. (2 Hum.) 154, 1840 WL 1554.

<sup>372</sup> 4 Ark. (4 Pike) 18, 1842 WL 331.

<sup>373</sup> That change may have been prompted by Nat Turner’s 1831 slave rebellion, which created fears of free blacks arming and inciting slaves. See Cottrol & Diamond, *supra* note 33, 80 Geo. L.J. at 337–38.

<sup>374</sup> 1840 WL 1554, at \*3.

<sup>375</sup> 312 F.3d at 1073.

<sup>376</sup> *Id.* (quoting *Aymette*, 1840 WL 1554, at \*5).

distinctive features that undermine its relevance to the Second Amendment. *Aymette*'s analysis rested heavily on the phrase "for their common defence" in the Tennessee provision, which is absent from the Second Amendment. The phrase pervades the court's brief analysis. The court defined "common" and even described the right to arms in the English Bill of Rights as if it included the word.<sup>377</sup> The court also relied on a conscientious objector clause that appeared elsewhere in the state constitution, citing it at the end of its opinion, in criticizing *Bliss*, to make "the case still more clear."<sup>378</sup> Yet no conscientious objector clause appears in the Second Amendment or even the Constitution.<sup>379</sup>

Second, and more importantly, *Aymette* does not reject an individual right either to keep or to bear arms, even though it may exclude individual self-defense from the meaning of "bear." The court was unequivocal on "keep": "The citizens have the unqualified right to keep the weapon," so long as it is a protected "arm."<sup>380</sup> It did describe "bear" as limited to "military use,"<sup>381</sup> but by that appears still to have contemplated a right that belonged to individuals rather than to the state or those engaged in its service.<sup>382</sup> The court did not mention the militia. Rather, the "military" bearing that it appears to have had in mind was the people, in an extreme case of governmental tyranny, independently bearing arms as a body to check the government. The court confined "bear" to the most radical of emergencies. Thus, it provided the following account of the English Revolution of 1688–1689:

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<sup>377</sup> 1840 WL 1554, at \*3; *see id.* at \*2. As noted above in Part III.B.2, in discussing the Massachusetts Declaration of Rights, the phrase "common defense" is not necessarily inconsistent with a right to bear arms for private purposes.

<sup>378</sup> *Id.* at \*5. Thus the Ninth Circuit was incorrect in contending that *Aymette* "reached its conclusion primarily because of" the conscientious objector provision, rather than the "common defense" language. *Silveira*, 312 F.3d at 1073. Furthermore, *Aymette*'s reliance on the conscientious objector provision was not persuasive, as our discussions of the Pennsylvania and Vermont declarations of rights (Part III.B.2) and proposals emerging from the Pennsylvania, Virginia, and North Carolina ratifying conventions (Part III.C.1) showed. *See also* Part II.B.2 (discussing meaning of "bear arms"). It was common in a single document to refer separately both to the right of individuals to "bear arms" and to exemption of individuals from the duty to "bear" them in the service of the government. In addition, the court's assertion that a hunter could never be said to "bear" arms, quoted above, is open to doubt, given the proposed Virginia law discussed in Part II.B.2 and the Pennsylvania Minority Report (*see* Parts II.B.2 and III.C.1), and, in any event, says nothing about persons "bearing" arms in self-defense. The court did not cite the decision of its southern neighbor in *Reid*, which appears to have been decided about six months before; it treated its previous discussion of the right in *Simpson* as dicta, 1840 WL 1554, at \*5–6.

<sup>379</sup> *See* Part III.C.2 above (discussing conscientious objector clause in draft of Second Amendment).

<sup>380</sup> 1840 WL 1554, at \*4. As we noted in the introduction of Part II.B, the Ninth Circuit, in reaffirming its collective right view, did not attempt to reconcile the right to "keep" arms with its view.

<sup>381</sup> *Id.* at \*3, \*5.

<sup>382</sup> *See id.* at \*4 ("the citizens may bear [arms] for the common defence," but "the Legislature may prohibit such manner of wearing as would never be resorted to by persons engaged in the common defence") (emphasis added).

[I]f the people had retained their arms, they would have been able, by a just and proper resistance to those oppressive measures, either to have caused the king to respect their rights, or surrender (as he was eventually compelled to do) the government into other hands. No private defence was contemplated, or would have availed anything. . . . [The right in the English Declaration means] that they may as a body rise up to defend their just rights, and compel their rulers to respect the laws. . . . The complaint was against the government. The grievances to which they were thus forced to submit were for the most part of a public character, and could have been redressed only by the people rising up for their common defence, to vindicate their rights.<sup>383</sup>

The court also wrote that the people “may keep arms to protect the public liberty, to keep in awe those in power, and to maintain the supremacy of the laws and the constitution.” Citizens need to be prepared “to repel any encroachments upon their rights by those in authority,” and the right “is a great political right. It respects the citizens, on the one hand, and the rulers on the other.”<sup>384</sup>

Subsequent treatment by the same court confirms that *Aymette*, despite its narrow reading of “bear,” still recognized an individual right. In *Andrews v. State*, a prominent case after the Civil War, the Tennessee Supreme Court interpreted the right of the “citizens of this State . . . to keep and bear arms for their common defense” under the state’s 1870 constitution. It was not until after *Andrews* that *Aymette*, previously uncited, acquired any prominence.<sup>385</sup> The new constitution had added an exception granting to “the Legislature . . . power by law, to regulate the wearing of arms, with a view to prevent crime,” which had been prompted by an

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<sup>383</sup> *Id.* at \*2.

<sup>384</sup> *Id.* at \*3–4. Furthermore, even if one might read the court’s rejection of an individual right to bear arms in “private defence” as foreclosing *any* individual right to bear arms, two aspects of the court’s reasoning (in addition to its analysis of “bear”) leave it open to question. First, the court’s account of the English right, *see id.* at \*2, was contrary to the text of the English Bill of Rights and Blackstone’s exposition of an individual right to arms for self-defense, and failed to recognize that the individual English right was transplanted to America free of England’s aristocratic restrictions, as Tucker, Rawle, Story, and others had recognized and praised. Second, faced with the defendant’s provocatively absolute claim regarding the scope of the right, *see id.* at \*1, the court responded with dichotomies between bearing arms by the body of the people for the common defense and “bearing” arms for hypothetical criminal purposes, such as terrifying people. In thus defining the question, the court defined away the well-established third possibility—bearing arms in legitimate self-defense—and overlooked background law prohibiting bearing weapons for the hypothesized purposes. *Compare id.* at \*3–4, with *Simpson*, 1833 WL 1227, at \*1; *State v. Huntly*, 25 N.C. (3 Ired.) 418, 1843 WL 891; 4 William Blackstone, *Commentaries* \*145–47; *Reid*, 1840 WL 229, at \*3, \*5–6.

<sup>385</sup> *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 1871 WL 3579, at \*6. *Andrews* was the first case in any jurisdiction to cite *Aymette* regarding the right to bear arms.

enduring dispute between partisans of *Aymette* and *Simpson*.<sup>386</sup> The statute at issue prohibited *any* public or private carrying of “a dirk, swordcane, Spanish stiletto, belt or pocket pistol or revolver.”<sup>387</sup> Notwithstanding the added constitutional clause and the arguable implications of *Aymette*, the court held it unconstitutional as applied to certain revolvers.<sup>388</sup>

In reaching this holding, the court went far to assimilate *Aymette* to the reasoning of *Reid* and *Nunn*, even while technically retaining *Aymette*’s view of “bear.”<sup>389</sup> It did so in three ways. First, it expressly reaffirmed that at least the right to “keep” belonged to individuals: The “right to bear arms for the common defense . . . may well be held to be a political right, or for protection and maintenance of such rights, intended to be guaranteed; but the right to keep them, with all that is implied fairly as an incident to this right, is a *private individual right, guaranteed to the citizen, not the soldier*.”<sup>390</sup> The court added, relying on *Story*, that it is “to be exercised and enjoyed by the citizen as such, and not by him as a soldier, or in defense solely of his political rights.”<sup>391</sup>

Second, *Andrews* read “keep” expansively to include broad “incidental use,” emphasizing that the goal of the right was to ensure that “the citizens making up the yeomanry of the land, the body of the militia,” would be prepared when needed. Thus:

The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair. And clearly for this purpose, a man would have the right to carry them to and from his home, and no one could claim that the Legislature had the right to punish him for it, without violating this clause of the Constitution.

But farther than this, it must be held, that the right to keep arms involves, necessarily, the right to use such arms for all the ordinary

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<sup>386</sup> See *id.* at \*8 (“The Convention of 1870, knowing that there had been differences of opinion on this question, have conferred on the Legislature in this added clause, the right to regulate the wearing of arms, with a view to prevent crime”); *id.* at \*13 (“Ever since the opinions were promulgated, it has been my deliberate conviction that the exposition of the Constitution . . . in *Simpson* . . . was much more correct than that . . . in *Aymette* . . .”) (Nelson, J., joined by Turley, J., dissenting in part).

<sup>387</sup> *Id.* at \*3.

<sup>388</sup> *Id.* at \*11.

<sup>389</sup> *Id.* at \*10 (finding “much of interesting and able discussion of these questions” in *Bliss*, *Reid*, and *Nunn*; explaining that in *Reid* and *Nunn* “the general line of argument found in this opinion is maintained” and that the court had been “aided . . . greatly by the reasoning of these enlightened courts”); *id.* (describing *Aymette* as “hold[ing] the same *general* views” as the *Andrews* court) (emphasis added).

<sup>390</sup> *Id.* at \*8 (emphasis added).

<sup>391</sup> *Id.* at \*9.

purposes, and in all the ordinary modes usual in the country, and to which arms are adapted, limited by the duties of a good citizen in times of peace . . . .

Because citizens needed to be able to “become familiar with” the use of arms “in times of peace, that they may the more efficiently use them in times of war, . . . the right to keep arms for this purpose involves the right to practice their use.”<sup>392</sup> Use for “ordinary purposes” included a man taking his gun “from his room into the street to shoot a rabid dog that threatened his child”<sup>393</sup> and using them on one’s property in lawful self-defense.<sup>394</sup> Such reasoning is in large measure the same as that taken by the traditional individual right view in explaining the relation between the Second Amendment’s preface and operative text.

Third, consistently with its reading of “keep,” the court also broadened “arms.” *Aymette* had defined the word to include only such arms “as are usually employed in civilized warfare, and that constitute the ordinary military equipment.”<sup>395</sup> *Andrews* explained it as follows: “[T]he idea of the Constitution is, the keeping and use of such arms as are useful either in warfare, or in preparing the citizen for their use in warfare, by training him as a citizen, to their use in times of peace.”<sup>396</sup> The court took judicial notice “that the rifle of all descriptions, the shot gun, the musket, and repeater, are such arms.”<sup>397</sup>

Thus, setting aside any distinctions based on the specific language of Tennessee’s Constitution, the consequence of *Aymette*, taken together with *Andrews*, is that “bear arms” was defined more narrowly in those cases, and “keep arms” more broadly, than was usual. The net result seems to be not far from the traditional individual right view held at the Founding and reflected in the great weight of early authority.

The divided 1842 decision of the Arkansas Supreme Court in *Buzzard* did not, even after the Civil War, ever acquire the prominence of *Aymette*, and when cited

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<sup>392</sup> *Id.* at \*6–7.

<sup>393</sup> *Id.* at \*11.

<sup>394</sup> *Id.* at \*13.

<sup>395</sup> 1840 WL 1554, at \*3.

<sup>396</sup> 1871 WL 3579, at \*9. The court elsewhere defined “arms” as those furthering the end of “the efficiency of the citizen as a soldier,” *id.* at \*7, and as including not only weapons “adapted to the usual equipment of the soldier” but also those “the use of which may render him more efficient as such,” *id.* at \*11. The term had to be “taken in connection with the fact that the citizen is to keep them as a citizen” and therefore included such “as are found to make up the usual arms of the country, and the use of which will properly train and render him efficient in defense of his own liberties, as well as of the State.” *Id.* at \*7.

<sup>397</sup> *Id.* at \*7; *id.* at \*11. Two judges dissented in part, criticizing *Aymette* and taking a broader view than the majority based on *Simpson*, *Bliss*, Blackstone, and Tucker. *Id.* at \*13–15 (Nelson, J., joined by Turney, J., dissenting in part). They argued that “for their common defense” was equivalent to “in defense of themselves and the State.” *Id.* at \*13–14. Similarly, “[t]he word ‘bear’ was not used alone in the military sense of carrying arms, but in the popular sense of wearing them in war or in peace.” *Id.*

it was simply for its limited, uncontroversial holding, upholding a ban on carrying weapons concealed.<sup>398</sup> Nevertheless, coming four years before *Nunn*, it appears to have been the first judicial holding involving the Second Amendment, and one judge's concurring opinion was the first appearance of something suggesting a collective right or quasi-collective right view.

The reasoning of the leading opinion for the 2-1 court was similar to that of *Aymette*. The court addressed both the Second Amendment and the 1836 Arkansas Constitution, which, like Tennessee's, provided that "the free white men of this State shall have a right to keep and bear arms for their common defense."<sup>399</sup> Despite the textual differences between these two provisions (in particular the Arkansas provision's "for their common defense" language), the court treated them as the same.<sup>400</sup> Much like *Aymette*, albeit without distinguishing between "keep" and "bear," the court apparently recognized a right of individuals but gave it a limited scope.<sup>401</sup> The Arkansas court's post-war decisions confirmed that the right secured by the Arkansas Constitution belonged to individuals and included the right to bear arms for at least some private purposes.<sup>402</sup>

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<sup>398</sup> *E.g.*, *Fife v. State*, 31 Ark. 455, 1876 WL 1562, at \*3 (summarizing holding and then relying on *Aymette* and *Andrews*); *State v. Wilforth*, 74 Mo. 528, 1881 WL 10279, at \*1 (including *Buzzard* in string citation with *Nunn*, *Jumel*, *Mitchell*, *Owen*, and *Reid*, and relying on *Reid*). *Buzzard* was first cited in 1872. *See State v. English*, 35 Tex. 473, 1872 WL 7422; *Carroll v. State*, 28 Ark. 99, 1872 WL 1104.

<sup>399</sup> *Buzzard*, 4 Ark. 18, 1842 WL 331, at \*6.

<sup>400</sup> *See id.* (equating the two, and adopting a single rule for evaluating restrictions).

<sup>401</sup> *See id.* at \*4 (explaining that "the militia, without arms . . . might be unable to resist, successfully, the effort of those who should conspire to overthrow the established institutions of the country, or subjugate their common liberties" and that "the people designed and expected to accomplish this object by the adoption of the article under consideration, which would forever invest them with a legal right to keep and bear arms for that purpose"); *id.* at \*6 ("The act in question does not . . . detract anything from the power of the people to defend their free state and the established institutions of the country."); *see also id.* at \*2 (expressly equating Second Amendment right with rights in First); *id.* at \*7 (noting that *Reid* and *Mitchell* had upheld similar laws notwithstanding constitutional provisions expressly protecting bearing arms in self-defense). As in *Aymette*, the court was faced with an absolute claim that the right was subject to no restrictions, and responded similarly. *See id.* at \*3, \*5.

<sup>402</sup> *See Carroll*, 1872 WL 1104, at \*2 (upholding conviction for carrying deadly weapon concealed and explaining *Buzzard* as holding that "a constitutional *right to bear arms in defense of person and property* does not prohibit the legislature from making such police regulations as may be necessary for the good of society, as to the manner in which such arms shall be borne"; adding that a "citizen" may not "use his own property or bear his own arms in such way as to injure the property or endanger the life of his fellow citizen") (emphases added); *Fife*, 1876 WL 1562, at \*3, \*4 (restating *Buzzard*'s holding, and upholding conviction for carrying pistol by construing statute only to apply to pistol that "is usually carried in the pocket, or of a size to be concealed about the person, and used in private quarrels, and brawls, and not such as is in ordinary use, and effective as a weapon of war, and useful and necessary for 'the common defence'"); *Wilson v. State*, 33 Ark. 557, 1878 WL 1301, at \*2 (reversing conviction for carrying side arms, where trial court had refused jury instruction to acquit if pistol was "army size . . . such as are commonly used in warfare"; citing *Fife* and *Andrews* and explaining that "*to prohibit the citizen from wearing or carrying a war arm, except upon his own premises or when on a journey . . . , or when acting as or in aid of an officer, is an unwarranted restriction upon his constitutional right to keep and bear arms*") (emphases added).

The concurring opinion cited no history or authority and, as far as we are aware, no court or even judge has ever cited it in interpreting a right to bear arms, whether secured by the Second Amendment or by any of the analogous provisions in state constitutions.<sup>403</sup> It did not present what would now be considered a standard collective right or quasi-collective right view. Whereas those views address the limits of federal power to interfere with state law, Judge Dickinson addressed the case from the opposite vantage point, stating the question as whether the state's ban on carrying weapons concealed "interfere[s] with any regulations made by Congress, as to the organizing, arming, or disciplining the militia, or in the manner in which that militia are either to keep or bear their arms."<sup>404</sup> In modern terminology, the judge seemed to recast the case as turning on possible federal preemption of the state law. The Second Amendment, in setting out what he described as "the power given the militia to keep and bear arms," merely rephrased the express federal powers in Article I, Section 8, Clause 16 of the Constitution, the Amendment being "but an assertion of that general right of sovereignty belonging to independent nations to regulate their military force."<sup>405</sup> The Amendment thus did not add any protection of *state* powers. That protection was implicit in Clause 16: "[T]he States *retain the power* to legislate in relation to arms and the mode of carrying and keeping them, provided its exercise is not repugnant to the previous grant to the Federal Government. . . . Could Congress authorize any and every person by express law, to carry deadly weapons concealed about his person, when not composing one of the militia, and not a part of the regulations ordained for their government?"<sup>406</sup>

The dissenting opinion employed the general rule for interpreting prefaces (discussed above in Part II.C.1), and the same reasoning as Rawle, Story, and *Nunn*, to explain the relation of the Amendment's preface to the right:

Now, I take the expressions 'a well regulated militia being necessary for the security of a free State,' and the terms 'common defense,' to be the reasons assigned for the granting of the right, and not a restriction or limitation upon the right itself. . . . [W]hen was it contended before that the reason given for the establishment of a right or

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<sup>403</sup> 1842 WL 331, at \*7 (Dickinson, J., concurring). *See also* Kopel, *supra* note 342, 1998 BYU L. Rev. at 1425 ("The *Buzzard* concurrence's assertion that the right to arms was not individual vanished from American case law for the rest of the nineteenth century.").

<sup>404</sup> 1842 WL 331, at \*7 (Dickinson, J.); *see id.* at \*10 ("The act . . . does not, in my opinion, conflict with any of the powers of the General Government.").

<sup>405</sup> *Id.* at \*7, \*9. It is unclear what significance he gave to the state constitution's provision. *See id.* at \*9.

<sup>406</sup> *Id.* at \*8.

its uninterrupted enjoyment not only limited the right itself, but restrained it to a single specific object?<sup>407</sup>

Judge Lacy also pointed to the Second Amendment's reference to a "free State": "To suppose that liberty cannot be in danger, except from a foreign foe or internal disorder, is virtually to deny the importance and necessity of written constitutions. . . . I cannot separate the political freedom of the State from the personal rights of its citizens."<sup>408</sup> He singled out the concurring opinion for granting the right to "the militia alone," and only at "the discretion of the Legislature"—a right "valueless and not worth preserving; for the State unquestionably possesses the power, without the grant, to arm the militia and direct how they shall be employed in cases of invasion or domestic insurrection. . . . [W]hy give that which is no right in itself and guarantees a privilege that is useless?"<sup>409</sup> Finally, the dissent explained the right much as Blackstone had, tying it to self-defense and pointing out that it was no more unlimited than the freedoms of speech and press.<sup>410</sup>

In sum, the activity of courts closest to the Founding tends to reinforce what the text and history establish—that the right secured by the Second Amendment belongs to individuals. No court questioned the private right to keep arms, and most recognized the traditional individual right to bear them. Two of the three state supreme courts to apply the Second Amendment (Georgia and Louisiana) repeatedly recognized a private right to bear arms for self-defense. The two cases taking the narrowest view of the right (both in states whose constitutions had "common defense" clauses in their right) were ignored, and even they recognized some manner of individual right. Only in an opinion of a single judge, which was and has continued to be ignored, did something like a quasi-collective or collective right understanding appear, but even that opinion did not view the Second Amendment as securing any right of states or of state (as opposed to federal) militias. On balance, then, the cases before the Civil War, like the first commentators, confirm that the text and history of the Second Amendment support the individual right view, not the collective right or quasi-collective right views.

### **C. Reconstruction**

As the Civil War ended in 1865, southern governments enacted "black codes," which, among other things, either directly prohibited the newly freed slaves from keeping and bearing arms or imposed stringent permit systems. In addition, armed white mobs, sometimes including the militias, frequently disarmed the freed

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<sup>407</sup> *Id.* at \*10 (Lacy, J., dissenting).

<sup>408</sup> *Id.* at \*14. *See also id.* (arguing that the right has at times "been the only means by which public liberty or the security of free States has been vindicated and maintained").

<sup>409</sup> *Id.* at \*10.

<sup>410</sup> *Id.* at \*12–14.

blacks.<sup>411</sup> Such practices, coupled with blacks' lack of citizenship, prompted the Thirty-Ninth Congress to take several actions securing the rights of the newly freed slaves and reaffirming the understanding that the right to keep and bear arms was a personal right.

The first action was enactment of the Civil Rights Act of 1866. One goal of many who sought its passage, noted by them and lamented by their opponents, appears to have been to secure to freedmen the Second Amendment's right to keep and bear arms. Both representatives and senators highlighted disarmament of blacks and argued that the Act, by making blacks citizens, would secure to them that right. Senator Trumbull, Chairman of the Judiciary Committee and a sponsor of the Act, explained that it would counteract those portions of the black codes that "prohibit any negro or mulatto from having fire-arms."<sup>412</sup> In the House, Representative Clarke quoted the Second Amendment and declared, "I shall insist that the reconstructed rebels of Mississippi respect the Constitution in their local laws"; he also decried that newly formed southern governments had been "allowed to rob and disarm our [black] veteran soldiers." Representative Raymond argued, in favor of the Act, that making blacks citizens would give to them "every right which you or I have," including "a right to bear arms."<sup>413</sup>

The second congressional action was passage of the Fourteenth Amendment in June 1866. Senator Pomeroy, in addressing an early draft, listed as among the "safeguards of liberty . . . under our Constitution" the right of "the freedman" to "bear arms for the defense of himself and family and his homestead," even suggesting that Congress's power to enforce the Thirteenth Amendment's ban on slavery might justify it in protecting this right in the South.<sup>414</sup> One of the Fourteenth Amendment's sponsors, in listing the rights of citizenship that its Privileges or Immunities Clause would extend to blacks, pointed to "the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; . . . [and] the right to keep and to bear

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<sup>411</sup> See, e.g., Laws of Miss. ch. 23, § 1, at 165 (enacted Nov. 29, 1865), reprinted in Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866–1876*, at 2 (1998). See generally Halbrook, *Freedmen* at 2–3, 5, 8–12, 15–16, 18–20, 22–23, 26–32, 34–37 (collecting reports of army and Freedmen's Bureau officers to President and Congress, petitions to Congress, and other public materials documenting attempts in former Confederacy in 1865 and 1866 to disarm blacks, including through legislation and by militias).

<sup>412</sup> Cong. Globe, 39th Cong., 1st Sess. 474 (1866). See also *id.* at 478 (Sen. Saulsbury, lamenting this effect of the Act). Regarding Trumbull, see Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 32 (2d ed. 1997).

<sup>413</sup> Cong. Globe at 1838–39 (Rep. Clarke); *id.* at 1266 (Rep. Raymond). See also *id.* at 1629 (Rep. Hart, explaining that Act would guarantee to free blacks "[a] government . . . where 'no law shall be made prohibiting the free exercise of religion'; where 'the right of the people to keep and bear arms shall not be infringed'").

<sup>414</sup> *Id.* at 1182.

arms.”<sup>415</sup> The *New York Times* and other leading newspapers reprinted these comments, including the reference to the Second Amendment, and praised them.<sup>416</sup>

This history indicates that it was widely recognized that the right to keep and bear arms was to be protected by the Civil Rights Act and the Fourteenth Amendment, and that that right was understood to belong to individuals. For example, Raoul Berger, even while arguing against the view that the Fourteenth Amendment “incorporated” the Bill of Rights to apply to the states, explains that “all are agreed” that the Fourteenth Amendment aimed at least “to embody and protect” the Civil Rights Act of 1866; he contends that the Act, in turn, “intended to confer on the freedmen the auxiliary rights that would protect their ‘life, liberty, and property’—no more.” He quotes Blackstone’s listing of these three principal rights and demonstrates Blackstone’s prominence in the debates and in the denunciations of the black codes.<sup>417</sup> As explained above in Part III.A, Blackstone described five “auxiliary rights,” and the right of individuals to have and use arms for their defense was one of them. Given the language of Section 1 of the Civil Rights Act, it may be that states simply could not discriminate against blacks in the right to keep and bear arms, not that the Second Amendment applied per se, but the point remains that there was a consensus that the right in question belonged to individuals and was a right *against* the state.<sup>418</sup>

Were there any remaining doubt on this question, Congress eliminated it a month after approving the Fourteenth Amendment, when it renewed the Freedmen’s Bureau over President Andrew Johnson’s veto. The act provided that wherever the courts were not open, or in any state that had not been restored to the Union, various rights, largely paralleling those in the Civil Rights Act, should “be secured to and enjoyed by all the citizens . . . without respect to race or color, or previous condition of slavery.” Among these were “the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms.*”<sup>419</sup> Congress thus not

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<sup>415</sup> *Id.* at 2765 (Sen. Howard).

<sup>416</sup> See Halbrook, *Freedmen*, *supra* note 411, at 36 (collecting excerpts).

<sup>417</sup> Berger, *Government by Judiciary*, *supra* note 412, at 30, 30–39, 53–54. Berger does not specifically mention the right to keep and bear arms. See, e.g., *id.* at 166–69 (addressing Sen. Howard’s statement but omitting his listing of rights).

<sup>418</sup> Section 1 of the Civil Rights Act declares all those born in the United States to be citizens, grants “the same right, in every State and Territory in the United States . . . as is enjoyed by white citizens” with regard to certain enumerated aspects of property, contracting, and lawsuits, and guarantees “full and equal benefit of all laws and proceedings for the security of person and property.” 14 Stat. 27, 27 (1866). In light of Blackstone’s understanding and the context of the black codes, any laws regarding the ability to keep or bear arms would presumably be “laws . . . for the security of person and property” and therefore would need to be equal for all citizens regardless of color.

<sup>419</sup> Act of July 16, 1866, § 14, 14 Stat. 173, 176 (emphasis added). The President’s reasons for his veto did not involve any disagreement with Congress regarding this right. See Veto Message (July 16, 1866), *reprinted in 8 Messages and Papers*, *supra* note 276, at 3620.

only enacted the understanding that the Second Amendment protected an individual right, including the right to “bear” arms, but also did so in a way that rested on Blackstone’s exposition of the individual right to arms as a critical auxiliary to the three primary individual rights of life, liberty, and property.

Congress took the same view early in the following year, demonstrating not only its understanding that the right belonged to individuals but also the limited, indirect way in which it protected the states’ militias. Responding to the southern militias’ depredations against the freed blacks, Congress included in a bill, which the President signed, a provision “[t]hat all militia forces now organized or in service” in the states of the former Confederacy “be forthwith disbanded, and that the further organization, arming, or calling into service of the said militia forces, or any part thereof, is hereby prohibited.”<sup>420</sup> Significantly, the bill’s sponsor had agreed to strike “disarmed” after “disbanded,” in the face of opposition from several (northern) senators that to disarm the citizens from whom the militia was drawn, rather than merely disbanding the militias, would violate the Second Amendment.<sup>421</sup> Congress’s actions both in disbanding the southern states’ militias and in not disarming their citizens show that it understood the Second Amendment right to protect individuals, not states or their militias.<sup>422</sup> Thus, from the Founding through the Civil War, the overwhelming understanding of the right of the people to keep and bear arms was that it was a right that belonged to individuals.

#### **D. Beyond Reconstruction**

As already suggested by our discussions above of *Andrews* and cases citing *Buzzard*, the understanding of the right to keep and bear arms as an individual right continued beyond the Civil War and Reconstruction. Although we do not provide an exhaustive survey of the post-war period, we find it significant that the modern alternative views of the right did not take hold until the twentieth century, well over a century after the Second Amendment was ratified. Before that, the

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<sup>420</sup> Act of Mar. 2, 1867, § 6, 14 Stat. 485, 487. The President did inform the House that he was signing under “protest” because this provision, and another to which he objected, were included in an essential appropriation bill. See Letter to the House of Representatives (Mar. 2, 1867), *reprinted in 8 Messages and Papers, supra* note 276, at 3670. Regarding the militia provision, he objected that it “denies to ten States of this Union their constitutional right to protect themselves in any emergency by means of their own militia.” It may be that in his constitutional objection he had in mind Article I, Section 10’s implicit recognition of the prerogative of states to defend themselves with their militias in cases of invasion or imminent danger. See Part II.D.2 above (discussing ways in which original Constitution recognizes that states will have and be able to use militias).

<sup>421</sup> The Senate debate is summarized from the Congressional Globe in Halbrook, *Freedmen, supra* note 411, at 68–69.

<sup>422</sup> See *id.* at 69 (“Astonishingly, while still waving the bloody shirt and depriving Southerners of suffrage, Republicans were unwilling to deny the right to have arms to ex-Confederates.”); Nelson Lund, Book Review, *Outsider Voices on Guns and the Constitution*, 17 Const. Comm. 701, 713 (2000) (reviewing Halbrook) (“This incident perfectly illustrates why the Second Amendment had been adopted in the first place.”).

views of the leading constitutional law scholar of the period, Thomas Cooley, were in accord with his predecessors Tucker, Rawle, and Story, in recognizing an individual right. And the Supreme Court, although making no holding regarding the substance of the Amendment, suggested in dicta that it protected an individual right.

Cooley's *General Principles of Constitutional Law*, first published in 1880, gained a prominence on the level of the works of his predecessors.<sup>423</sup> As had the antebellum commentators, he espoused the individual right view of the Second Amendment. After quoting the Amendment, noting that it was a "modification and enlargement from the English Bill of Rights," and citing Tucker, Cooley added the following:

*The Right is General.*—It might be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. . . . [I]f the right were limited to those enrolled [in the militia, a number that the government could constrict], the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose. But this enables the government to have a well-regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order.<sup>424</sup>

Cooley's rejection of any collective right and quasi-collective right view is consistent with the understanding of the Amendment's prefatory clause that is evident from the Founding and had been reiterated before the Civil War by Rawle, Story, and *Nunn*. Even Cooley's heading echoed Rawle's statement over fifty years earlier: "The prohibition is general."<sup>425</sup> Cooley likewise treated *both* keeping and bearing as private rights of citizens, and recognized that the right has limita-

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<sup>423</sup> See *supra* note 41; Kates, *supra* note 33, 82 Mich. L. Rev. at 243. Among Cooley's many works was to prepare the fourth edition of Story's unabridged *Commentaries*, published in 1873.

<sup>424</sup> Cooley, *General Principles*, *supra* note 41, at 271. Cooley cited 1 Tucker's Blackstone, *supra* note 60, at 300, which praises the right in the Second Amendment as "the true palladium of liberty" and, paralleling Blackstone, ties it to the natural "right of self defence." See Part IV.A above.

<sup>425</sup> Rawle, *View of the Constitution*, *supra* note 327, at 125, discussed above in Part IV.A.

tions (“the laws of public order”), just as any other individual right does.<sup>426</sup> Conversely, in discussing the Militia Clauses of Article I, Section 8, in a separate part of his treatise, he made no mention of the Second Amendment.<sup>427</sup>

Cooley reiterated this individual right interpretation in his even more celebrated *Treatise on the Constitutional Limitations*, first published in 1868.<sup>428</sup> Among the clauses common in state constitutions, he explained, were “[t]hose declaratory of the fundamental rights of the citizen,” among which were freedom of speech and of the press and “that every man may bear arms for the defence of himself and the State.”<sup>429</sup> In a later chapter he included the right among the “the constitutional protections to personal liberty”: “Among the other defences to personal liberty should be mentioned the right of the people to keep and bear arms.” He explained the right’s English origins, noted the importance for a “well-regulated militia” of “the people” being “trained to bearing arms,” praised the lack of legislation “regulat[ing] this right,” and cited *Bliss, Nunn*, and a case concerning the right of self-defense.<sup>430</sup> Finally, in elsewhere explaining the scope of a state’s concurrent power to organize and discipline the militia, Cooley simply cited *Houston v. Moore*, not mentioning the Second Amendment.<sup>431</sup> Like the Court, he apparently did not see the Amendment as relevant to the scope of the state’s power to maintain a militia.

The Supreme Court did not address the substance of the Second Amendment during this period, because of its view that the Bill of Rights, including the Second Amendment, did not apply to the states.<sup>432</sup> In *Robertson v. Baldwin*, however, the Court invoked the history of, and limitations on, the various rights in the Bill of Rights, including the Second Amendment, to illustrate and defend a holding regarding the limitations on the Thirteenth Amendment’s ban on slavery:

The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intend-

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<sup>426</sup> He added, citing *Andrews* (which had not interpreted the Second Amendment), that the Amendment protected the keeping of arms “suitable for the general defence of the community against invasion or oppression,” whereas “the secret carrying of those suited merely to deadly individual encounters may be prohibited.” Cooley, *General Principles*, *supra* note 41, at 271–72.

<sup>427</sup> *Id.* at 88–89.

<sup>428</sup> See Kopel, *supra* note 342, 1998 BYU L. Rev. at 1462.

<sup>429</sup> Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 35–36 (1868).

<sup>430</sup> *Id.* at 350; see *id.* at 295 (chapter title). *Miller* cited this section. See 307 U.S. at 182 n.3 (citing “Cooley’s Constitutional Limitations, Vol. 1, p. 729,” likely the 8th edition, published well after Cooley’s death).

<sup>431</sup> Cooley, *Constitutional Limitations*, *supra* note 429, at 18.

<sup>432</sup> See *Presser v. Illinois*, 116 U.S. 252, 264–65 (1886); see also *United States v. Cruikshank*, 92 U.S. 542, 553 (1876); *Logan v. United States*, 144 U.S. 263, 286–87 (1892); *Maxwell v. Dow*, 176 U.S. 581, 597 (1900). As noted above in Part I, the federal government did not regulate private firearms until 1934.

ed to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (art. 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; [and] the right of the people to keep and bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons . . . .<sup>433</sup>

The Court added similar illustrations from the Fifth and Sixth Amendments. The Court thus suggested that the Second Amendment protected an individual right, both by treating it in parallel with the individual rights in the rest of the Bill of Rights and by pointing to the right's English origins.

Not until 1905 was a view rejecting the individual right view truly born, and then in a decision interpreting not the Second Amendment but rather a provision in a state constitution. In *City of Salina v. Blaksley*, the Kansas Supreme Court held that a clause in the Kansas Bill of Rights, providing that “[t]he people have the right to bear arms for their defence and security,” referred only “to the people as a collective body” and dealt “exclusively with the military. Individual rights are not considered in this section.” Rather, the “people shall exercise this right” through the *power of their legislature*, set out in the body of the state constitution, to organize, equip, and discipline the militia. The right extended “only to the right to bear arms as a member of the state militia, or some other military organization provided for by law.”<sup>434</sup> The court seems to have been influenced by a provision in the state constitution admonishing against standing armies in time of peace, and praising civilian control of the military, that immediately followed the text of the right.<sup>435</sup> The court also, without citing historical authority and with little explanation, pointed to the Second Amendment as analogous and reinforcing its reading.<sup>436</sup> *Salina's* novelty was

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<sup>433</sup> 165 U.S. 275, 281–82 (1897).

<sup>434</sup> 83 P. 619, 620 (Kan. 1905).

<sup>435</sup> See *id.* As shown in Parts III.B.2 and III.C.1, however, there was nothing unusual in combining such declarations with an individual right to arms.

<sup>436</sup> See *Blaksley*, 83 P. at 620. The Fifth Circuit in *Emerson* criticized *Salina*, to the extent that it was endorsing a quasi-collective right view, as “constru[ing] the constitutional provision as saying no more than that the citizen has a right to do that which the state orders him to do and thus neither grants the citizen any right nor in any way restricts the power of the state.” It found such a criticism “especially applicable to the theory that such *state* constitutional provisions grant rights only to the state,” noting that *Salina* did “not appear even to recognize, much less attempt to justify, the anomaly of construing a constitutional declaration of rights as conferring rights only on the state which had them anyway.” 270 F.3d at 231 n.30 (emphasis added). In the context of the right to keep and bear arms in

not missed. One state supreme court soon after, in a survey reaching back to *Bliss*, *Reid*, *Nunn*, and *Aymette*, described *Salina* as having gone “further than any other case” by holding that the right to bear arms in the Kansas Constitution imposed no limit on the legislature’s power to prohibit private individuals from carrying arms.<sup>437</sup>

## V. Conclusion

For the foregoing reasons, we conclude that the Second Amendment secures an individual right to keep and to bear arms. Current case law leaves open and unsettled the question of whose right is secured by the Amendment. Although we do not address the scope of the right, our examination of the original meaning of the Amendment provides extensive reasons to conclude that the Second Amendment secures an individual right, and no persuasive basis for either the collective right or quasi-collective right views. The text of the Amendment’s operative clause, setting out a “right of the people to keep and bear Arms,” is clear and is reinforced by the Constitution’s structure. The Amendment’s prefatory clause, properly understood, is fully consistent with this interpretation. The broader history of the Anglo-American right of individuals to have and use arms, from England’s Revolution of 1688–1689 to the ratification of the Second Amendment a hundred years later, leads to the same conclusion. Finally, the first hundred years of interpretations of the Amendment, and especially the commentaries and case law in the pre-Civil War period closest to the Amendment’s ratification, confirm what the text and history of the Second Amendment require.

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the federal Constitution, the quasi-collective right view appears to amount to the right of a militiaman, through a private cause of action (or defense), to act as an agent for the interests of the state to vindicate its power to establish and maintain an armed and organized militia such as the National Guard. *See, e.g., United States v. Haney*, 264 F.3d 1161, 1165 (10th Cir. 2001).

<sup>437</sup> *Strickland v. State*, 72 S.E. 260, 262 (Ga. 1911). For additional discussion of *Salina*, see Kopel, *supra* note 342, 1998 BYU L. Rev. at 1510–12.

## Requirement That “Private Citizens” Be Appointed From “Private Life” to the National Council for the Humanities

Because state and local public officials, including a county commissioner, are not “private citizens” who would be appointed “from private life” within the ordinary meaning of those terms in 20 U.S.C. § 957(b), such officials are disqualified from appointment to the National Council for the Humanities.

August 27, 2004

### MEMORANDUM OPINION FOR THE DEPUTY COUNSEL TO THE PRESIDENT

You have asked for our opinion whether the statutory requirement that members of the National Council for the Humanities (“NCH”) be appointed “from private life” and “selected from among private citizens of the United States,” 20 U.S.C. § 957(b) (2000), bars appointment of a state or local government official. We understand, in particular, that this question concerns the possible appointment of a part-time county commissioner. We conclude that because state and local public officials, including a county commissioner, are not “private citizens” who would be appointed “from private life” within the ordinary meaning of those terms, such officials are disqualified from appointment to the NCH under section 957(b).

The statute authorizing the President to appoint members of the NCH provides:

The Council shall be composed of the Chairperson of the National Endowment for the Humanities, who shall be the Chairperson of the Council, and twenty-six other members appointed by the President, by and with the advice and consent of the Senate, *from private life*. Such members shall be individuals who (1) are *selected from among private citizens of the United States* who are recognized for their broad knowledge of, expertise in, or commitment to the humanities, and (2) have established records of distinguished service and scholarship or creativity and in a manner which will provide a comprehensive representation of the views of scholars and professional practitioners in the humanities and of the public throughout the United States.

*Id.* § 957(b) (emphases added).<sup>1</sup>

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<sup>1</sup> The National Endowment for the Humanities (“NEH”) was created in 1965 to promote scholarly, educational, and public projects in the humanities. *See* 20 U.S.C. §§ 956–958. The NEH is headed by the Chairperson of the Endowment, who is authorized to enter into contracts, issue grants and loans, and make other arrangements consistent with advancing the humanities. *Id.* § 956(b)–(c). The Chairperson is advised by the NCH, which consists of 26 members appointed to staggered six-year terms. *Id.*

The requirement that NCH members be selected from “private life” and from among the “private citizens of the United States” generally disqualifies all government officials, whether federal, state, or local, from appointment to the NCH. The plain meaning of the statute, particularly the phrase “private citizens,” governs the question at issue. The word “private” is derived from the Latin *privātus*, meaning “apart from the state, deprived of office.” *Webster’s Third Int’l Dictionary of the English Language* 1804 (2002). According to its ordinary definition and usage, the adjective “private,” specifically when used in the phrase “private citizen,” means “not invested with or engaged in public office or employment (a ~ citizen).” *Id.* at 1805. *See also Funk & Wagnall’s Standard College Dictionary* 1072 (1969) (“Having no official rank, character, office, etc.: a private citizen”); *American Heritage Dictionary of the English Language* 1442 (1992) (“Not holding an official or public position”); *Random House Dictionary of the English Language* 1540 (2d ed. 1987) (“not holding public office or employment: *private citizens*”). The word “private” has similar meaning when used in the phrase “private life.” *See id.* (“not of an official or public character: *private life*”). These phrases, by their plain terms, exclude all persons who hold public office.

Consistent with this plain meaning, this Office has interpreted similar statutes that require appointment “from private life” to preclude appointment of persons who hold government office, whether federal or state, at the time of the appointment.<sup>2</sup> *See* Memorandum for Dudley H. Chapman, Associate Counsel to the President, from Leon Ulman, Acting Assistant Attorney General, Office of Legal Counsel, *Re: The Status of Members of the Board of Trustees of the Woodrow*

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§ 957(b)–(c). The NCH advises generally on matters relating to the Endowment’s mission, and the Chairperson is required to seek the recommendation of the NCH on any application for funding that exceeds \$30,000. *Id.* § 957(f). The recommendation of the NCH does not bind the Chairperson, however; the Council is advisory only. *Id.* Because the NCH is strictly advisory, members of the NCH are not “Officers of the United States” for purposes of the Appointments Clause, and thus the qualifications on NCH appointments set forth in section 957(b) do not violate the Constitution. *See The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 144 (1996); *Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 249 (1989).

<sup>2</sup> Similar appointment requirements are found in a number of other federal statutes. For statutes requiring appointment of “private citizens,” see 12 U.S.C. § 4703(d) (2000) (Community Development Advisory Board); 16 U.S.C. § 19f (2000) (National Park Foundation Board); 42 U.S.C. § 4273(a)(1) (2000) (Advisory Commission on Intergovernmental Relations); 20 U.S.C. § 955(b)(C)(i) (2000) (National Council on the Arts). For statutes requiring appointment “from private life,” see 2 U.S.C. § 352(1) (2000) (Citizens’ Commission on Public Service and Compensation); 12 U.S.C. § 2402(a)(13) (2000) (National Commission on Electronic Fund Transfers); 20 U.S.C. § 80f(b)(9) (2000) (Board of Trustees for the Woodrow Wilson International Center for Scholars); 20 U.S.C. § 2103(b)(1)(B) (2000) (Board of Trustees for the American Folklife Center); 22 U.S.C. § 290f(g) (2000) (Board of Trustees for the Inter-American Foundation); 22 U.S.C. § 290h-5(a)(1) (2000) (Board of Directors for the African Development Foundation); 29 U.S.C. § 656(b) (2000) (National Advisory Committee on Occupational Safety and Health). The courts have not construed these appointment provisions, and we are not aware of relevant case law interpreting the phrases “public citizen” or “public life” in a manner inconsistent with our analysis.

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*Wilson International Center for Scholars* (June 27, 1975) (opining that members may remain on the board of the Wilson Center after becoming public officials but may not hold public office at the time of their appointment); Memorandum for the Deputy Attorney General from W. Wilson White, Assistant Attorney General, Office of Legal Counsel, *Re: H.R. 1131, Commission on Voter Participation in Federal Elections* (June 20, 1957) (pointing out that a requirement in proposed legislation (never enacted into law) that certain commission members be state or local government representatives would be inconsistent with language in the same bill prescribing appointment “from private life”). We also note that in other contexts, we have acknowledged a distinction between “private citizens” and state government officials. *See, e.g., Common Legislative Encroachments On Executive Branch Authority*, 13 Op. O.L.C. 248, 250 (1989) (listing “private citizens” separate from “state officials”); *Delegation of Authority to State Governors in End-user Gasoline Allocation Program*, 3 Op. O.L.C. 231, 232 (1979) (discussing “State officers” separate from “private citizens”).

In prescribing generally that NCH members be appointed “from private life” and “from among private citizens,” Congress did not intend, in our view, to distinguish federal government officials, on the one hand, from state and local government officials, on the other. Congress has used specific language when it intends to disqualify only federal officials from appointment to particular offices. *See, e.g.,* 42 U.S.C. § 242m(b)(2)(C) (2000) (requiring that members of peer review groups advising the Secretary of Health and Human Services be appointed “from among persons who are not officers or employees of the United States”). *See also* 42 U.S.C. § 289a-1(b)(5)(C) (2000) (Ethics Advisory Boards for the National Research Institute); 42 U.S.C. § 5616(a)(2)(A) (2000) (Coordinating Council on Juvenile Justice and Delinquency Prevention); 49 U.S.C. § 30306(c)(1) (2000) (National Driver Register Advisory Committee); 50 U.S.C. app. § 1989b-5(c)(1) (2000) (Civil Liberties Public Education Fund Board of Directors). These examples of other statutes specifically precluding appointment of federal officials reinforce the plain meaning of section 957(b); language requiring appointees to be “private citizens” selected “from private life” is deliberately broader than a proscription against appointment of federal officials.<sup>3</sup>

We are informed that in at least one instance a state official was appointed to a similar body, the National Council for the Arts (“NCA”). As with the NCH, NCA

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<sup>3</sup> We are aware of an instance in which some members of Congress, in legislative history, appeared to equate the phrase “not Federal officers or employees” with “private-life members.” *See* H.R. Conf. Rep. No. 105-599, at 197 (1998) (describing statutory membership requirements for the Internal Revenue Service Oversight Board, codified at 26 U.S.C. § 7802 (2000)). But in that instance the terms “private life” and “private citizen” did not appear in the statute, which specifically prescribed only that members of the IRS Oversight Board be “individuals who are not otherwise Federal officers or employees.” 26 U.S.C. § 7802(b)(1)(A). That statutory language supports our view that Congress would use more specific language if it intended to bar only federal officials from appointment to the NCH.

appointees must be “private citizens.” 20 U.S.C. § 955(b)(C)(i) (2000). We understand that, in 1989, a state senator from New York was appointed to the NCA. This Office evidently did not opine on that appointment. We do not believe that this single appointment constitutes a history and practice that may overcome the plain meaning of the statutory text governing appointments to the NCH. *See Nat’l Fed’n of Fed. Emps., Local 1309 v. Dep’t of Interior*, 526 U.S. 86, 95–96 (1999) (“[A] single, unreviewed decision [based on an executive order that preceded the statute] does not demonstrate the kind of historical practice that one might assume would be reflected in the Statute.”).

Nor do we believe the statutory text could bear a distinction between state officials, on the one hand, and local government officials, such as a county commissioner. One who holds or is invested with a public office, whether part of state or local government, is not a “private citizen” or in “private life” within the ordinary sense of those terms. Congress appears to have recognized this ordinary distinction between private citizens and local officials in statutory language: “[the Director may appoint] one or more advisory committees composed of such *private citizens and officials of Federal, State, and local governments.*” 42 U.S.C. § 285a-2(b)(7) (2000) (National Cancer Institute Advisory Committee) (emphases added). *See also* 49 U.S.C. § 1113(b)(1)(E) (2000) (Advisory Committees to the National Transportation Safety Board must be “composed of qualified private citizens and officials of the Government and State and local governments”). Again, the inference from these examples is clear: “private citizens” are distinguished from local government officials.

In one instance, under a different statute, we did conclude that a municipal employee could be appointed to a position reserved for those from “private life.” Memorandum for the Vice President from Nicholas deB. Katzenbach, Assistant Attorney General, Office of Legal Counsel, *Re: Appointment to the United States Citizens Commission on NATO* (Mar. 1, 1961). That opinion addressed an appointment to the United States Citizens Commission on NATO (“NATO Commission”), a two-year advisory commission intended to meet with citizens in other NATO countries to facilitate greater cooperation and unity of purpose within NATO. *See* Pub. L. No. 86-719, 74 Stat. 818 (1960). As with the NCH, appointees to the NATO Commission were to be appointed from “private life.” *Id.* In that opinion, we relied solely on the legislative history of the provision, which indicated that Congress wanted only to insure that appointees to the NATO Commission were not connected with the foreign policy of the United States. Specifically, Congress desired an objective perspective on foreign policy and went so far as to vest the authority to make appointments to the NATO Commission in Congress, not in the President. Based on that unique legislative history, we concluded that a Chicago municipal employee—who obviously had no prior connection with the foreign policy of the United States—qualified for appointment to that particular commission.

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Legislative history, of course, cannot trump the clear words of a statute, and we question the continued validity of our 1961 opinion for that reason. In any event, here, by contrast, there is no such legislative history indicating that Congress was specifically concerned to ensure only that appointees to the NCH be unaffiliated with the federal government, as distinct from local government. Indeed, there is no relevant legislative history at all on the “private life” and “private citizen” appointment requirement for NCH. To the extent the legislative history discusses the appointment requirements of section 957(b), it is only to emphasize the other criteria set forth in section 957(b)—that NCH appointees should broadly represent the humanities and be individuals of distinction in and commitment to the humanities. *See* S. Rep. No. 91-879, at 3 (1970). *See also* 20 U.S.C. § 957(b) (NCH appointees must be “recognized for their broad knowledge of, expertise in, or commitment to the humanities,” “have established records of distinguished service,” and “provide a comprehensive representation of the views of scholars and professional practitioners in the humanities”). The fact that only private citizens may be appointed suggests that Congress was seeking more than just expertise from the NCH; it specifically wanted the NCH appointees to be non-governmental.

We believe the same conclusion holds when the local government official exercises his or her duties on a part-time basis only, even if the public official also holds a full-time private job. The dictionary definition of “private citizen” reinforces this view: a person is a private citizen if he or she does not hold a public office and is not engaged in public employment. *Webster’s Third Int’l Dictionary* at 1805. A person who holds such an office, whether full-time or part-time, is not a private citizen. The definition indicates that whether persons are public officials turns on the nature of their position, not the number of hours occupied in their official duties. Many important government officials are or have been part-time. Indeed, the first twenty-three Attorneys General of the United States were part-time and continued to represent private clients. *See* Luther A. Huston, *The Department of Justice* 11 (1967). Nonetheless, even a part-time Attorney General surely would not be classified as a private citizen. According to the National Conference of State Legislatures, only eleven states have legislatures whose public duties occupy eighty percent or more of the time equivalent of a full-time job. *National Conference of State Legislatures*, available at <http://www.ncsl.org/programs/legman/about/partfulllegis.htm> (last visited Aug. 26, 2004). Whether full-time or part-time, legislators are elected officials who exercise lawmaking powers and are clearly public officials disqualified from appointment to the NCH. If part-time officials could be considered private citizens, then numerous local government officials, including county commissioners, state legislators, state and local judges, and city council members, would have to be deemed private citizens.<sup>4</sup> We

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<sup>4</sup> The average city council member spends only 22 hours per week on council-related duties. National League of Cities, *Serving on City Councils: America’s City Councils in Profile (Part II)*, at 2–3 (2003),

think that in light of the considerable governmental powers exercised by such officials, they cannot be deemed private citizens consistent with the ordinary usage of that term. We therefore conclude that local government officials who exercise lawmaking or policymaking powers pursuant to their office cannot be considered private citizens regardless of whether they are full-time or part-time.

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*available at [http://www.nlc.org/nlc\\_org/site/files/pdf/council\\_brief2.pdf](http://www.nlc.org/nlc_org/site/files/pdf/council_brief2.pdf) (last visited Aug. 26, 2004). Most county commissioners are part-time. National Association of Counties, *What Do County Commissioners Do All Day?* at 3, *available at* <http://www.naco.org/ContentManagement/ContentDisplay.cfm?ContentID=12026> (last visited Aug. 26, 2004). Part-time local judges are sufficiently common that the ABA Model Code of Judicial Conduct distinguishes ethical rules for part-time versus full-time judges. *See Model Code of Judicial Conduct Application* §§ C–E (1990).*

## Ethical Issues Raised by Retention and Use of Flight Privileges by FAA Employees

Although flight privileges generally do not require disqualification under 18 U.S.C. § 208 from all matters involving the relevant air carrier, a Federal Aviation Administration employee who holds such flight privileges must disqualify him or herself from particular matters where FAA action may have a direct and predictable effect on the relevant air carrier's ability to honor the employee's flight privileges.

An employee with flight privileges and the airline that provided them have a "covered relationship" that must be analyzed under an Office of Government Ethics regulation (5 C.F.R. § 2635.502) to determine whether the employee's participating in a matter involving that airline would create an "appearance problem." The regulation entrusts the agency and the employee to make that determination based on the facts of a particular case.

Although flight privileges could constitute a "payment" within the meaning of another OGE regulation (5 C.F.R. § 2635.503), and therefore must be analyzed under the regulation, they do not constitute an "extraordinary payment" under the described circumstances.

Flight privileges are not a type of interest that would qualify as "stock" or "any other securities interest" under a Department of Transportation regulation (5 C.F.R. § 6001.104(b)) that supplements the OGE impartiality regulations.

August 30, 2004

### MEMORANDUM OPINION FOR THE DEPUTY CHIEF COUNSEL FEDERAL AVIATION ADMINISTRATION

You have requested our opinion on four issues related to the retention and use of "flight privileges" by employees of the Federal Aviation Administration ("FAA").<sup>1</sup> Flight privileges are no-cost air travel privileges earned through former employment with an air carrier. We understand that flight privileges represent a common retirement benefit in the airline industry available to all retired airline employees meeting certain length-of-service requirements. We also understand that while an airline may eliminate or modify the flight privileges of all retirees, it may not do so on a case-by-case basis by refusing to honor the flight privileges of a particular retiree who otherwise satisfies the rules governing their use. We further understand that flight privileges cannot be sold or transferred.

*First*, you ask whether flight privileges are a disqualifying "financial interest" for FAA employees under 18 U.S.C. § 208 (2000), the criminal conflict of interest statute. We conclude that although flight privileges generally do not require disqualification under section 208 from all matters involving the relevant air carrier, an FAA employee who holds such flight privileges must disqualify him or

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<sup>1</sup> Letter for Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, from James W. Whitlow, Deputy Chief Counsel, Federal Aviation Administration (June 16, 2004). The Office of Government Ethics and the Criminal Division of the Department of Justice concur in this memorandum.

herself from particular matters where FAA action may have a direct and predictable effect on the relevant air carrier's ability to honor the employee's flight privileges.

*Second*, you ask whether flight privileges must be analyzed under 5 C.F.R. § 2635.502 (2003), an Office of Government Ethics ("OGE") regulation that under certain circumstances requires an employee to recuse him or herself if participating in a matter would create an "appearance problem." We conclude that an employee with flight privileges and the airline that provided them have a "covered relationship" that must be analyzed under the regulation to determine whether the employee's participating in a matter involving that airline would create an appearance problem. This Office, however, is not in a position to decide in the abstract for an agency or an employee whether there would be an appearance problem. Instead, the regulation entrusts the agency and the employee to make that determination based on the facts of a particular case.

*Third*, you ask whether flight privileges must be analyzed under 5 C.F.R. § 2635.503 (2003), an OGE regulation that generally prohibits a government employee from participating for two years in matters involving his former employer if the employee received an "extraordinary payment" prior to entering government service. We conclude that although flight privileges could constitute a "payment" within the meaning of the regulation, and therefore must be analyzed under the regulation, they do not constitute an "extraordinary payment" under the circumstances you have described.

*Fourth*, you ask whether flight privileges are a type of interest that would qualify as "stock" or "any other securities interest" under a Department of Transportation regulation that supplements the OGE impartiality regulations. *See* 5 C.F.R. § 6001.104(b) (2003). We conclude that they are not, as those terms are not naturally read to include benefits like flight privileges.

## I.

You first ask whether flight privileges are a disqualifying "financial interest" under 18 U.S.C. § 208(a), the criminal conflict of interest statute. Section 208(a) provides that

[e]xcept as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a

ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest . . . [s]hall be subject to the penalties set forth in section 216 of this title.

*Id.* Congress enacted section 208(a) in 1962 as part of a general revision of the conflict of interest laws. Pub. L. No. 87-849, sec. 1(a), § 208(a), 76 Stat. 1119, 1124 (1962).

In answering your question, we “begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” *Engine Mfrs. Ass’n v. S. Coast Air Qual. Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (internal quotation omitted). By prohibiting an executive branch officer or employee from participating “personally and substantially” in a “particular matter” “in which,” “to his knowledge,” he has a “financial interest,” section 208 makes clear that, in order to be a disqualifying financial interest, an interest must be a “financial interest” “in” a matter. The question, then, is not whether flight privileges (or any other category of property or benefit) qualify as a financial interest per se, but whether the holding of flight privileges by an employee may constitute *a financial interest in a particular matter*. Compare 18 U.S.C. § 208(a) (2000) (requiring a determination whether an employee has a financial interest *in a matter*) with 18 U.S.C. § 434 (1958) (section 208(a)’s predecessor, requiring a determination whether an employee has an “interest[] in the pecuniary profits or contracts of any corporation . . . or other business entity”), 5 C.F.R. § 6001.104(b) (requiring a determination whether an employee has a “securities interest in an airline”), and 5 C.F.R. § 6001.104(a) (requiring a determination whether an employee has “a financial interest . . . in a railroad company”).<sup>2</sup>

While the statute does not define what it means to have a “financial interest” “in” a governmental matter, or what kinds of property or possessions can give rise to a financial interest in a matter, these words have an ordinary meaning and usage. As generally understood, a “financial interest” is an interest “pertaining to monetary receipts and expenditures.” *Random House Dictionary of the English Language* 532 (1971); see also *Black’s Law Dictionary* 816 (7th ed. 1999) (“inter-

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<sup>2</sup> See Roswell B. Perkins, *The New Federal Conflict-of-Interest Law*, 76 Harv. L. Rev. 1113, 1131 (1963) (noting that section 434 “was limited to situations where the government employee had one of two basic types of interest in the private party, *i.e.*, the ‘business entity,’ involved in the governmental proceeding,” while section 208(a) “requires that there be a ‘financial interest’ on the part of someone in the particular government proceeding”).

est” means “[a]dvantage or profit, esp. of a financial nature”). And by everyday standards of language, one has a financial interest in a governmental matter only when the particular matter can affect one’s finances—i.e., one’s monetary receipts and expenditures.

The ordinary understanding of these words also accords with the OGE’s regulatory interpretation of section 208. Exercising its authority to “promulgat[e], with the concurrence of the Attorney General, regulations interpreting the provisions of . . . section 208,” Exec. Order No. 12674, § 201(c), 3 C.F.R. 215, 216 (1989), the OGE has interpreted the term “financial interest” to mean “the potential for gain or loss to the employee, or other person specified in section 208, as a result of governmental action on the particular matter.” 5 C.F.R. § 2640.103(b) (2003). “[A] disqualifying financial interest” in a matter, then, “might arise from ownership of certain financial instruments or investments such as stock, bonds, mutual funds, or real estate.” However, “a disqualifying financial interest” might also “derive from a salary, indebtedness, job offer, or any similar interest that may be affected by the matter.” *Id.*

The OGE regulations also amplify what it means for a matter to “affect” an employee’s finances. To constitute a disqualifying financial interest in a matter, the OGE regulations explain, a governmental matter must have more than a mere potential to affect the employee financially; rather, there must be “a direct and predictable effect.” 5 C.F.R. § 2635.402(a) (2003); *id.* § 2640.103(a) (same). The “direct and predictable effect” requirement reflects the longstanding view of this Office, as well. See *Advisory Committees—Food and Drug Administration—Conflicts of Interest (18 U.S.C. § 208)*, 2 Op. O.L.C. 151, 155 (1978); Memorandum for the Heads of Executive Departments and Agencies from the President, 28 Fed. Reg. 4539, 4543 (May 7, 1963).

These principles find straightforward application here. As a general matter, flight privileges will not require blanket disqualification under section 208 from all matters involving or affecting the air carrier that conferred the privileges. While their value to the employee may fluctuate as airfares rise and fall, flight privileges, we understand, do not fluctuate in value with the sponsor’s business prospects. They cannot be sold or transferred, they do not trade on a market, they possess no resale value, and, indeed, they cannot be liquidated. Rather, the value to an employee of flight privileges is a simple function of the airline’s ability to honor them. Many, if not most, FAA matters relating to the air carrier would likely have no direct and predictable effect on the airline’s ability to honor an employee’s flight privileges and would likely not financially affect the employee’s interests within the meaning of the statute.

It may be the case, however, that certain, perhaps extraordinary, FAA matters may create a disqualifying financial interest for an employee on account of flight privileges. Where an FAA matter, for example, has the clear potential to result in the airline’s losing its operating certificate, losing its right to fly, and thereby losing the ability to honor flight privileges, an employee who holds flight privileg-

es on that airline and who participates personally and substantially in that particular matter would have a financial interest in it. As flight privileges enable the holder to fly for free where non-holders must pay money, a prospective loss of flight privileges would “pertain to monetary . . . expenditures” and entail “the potential for” a monetary “loss to the employee.”<sup>3</sup> Thus, we cannot categorically exclude the possibility that a financial interest in a particular matter can derive from flight privileges, although we can conclude that it would involve extraordinary circumstances. *Cf.* 5 C.F.R. § 2640.203(e) & ex. 1 (suggesting that participation in a “frequent flier program” can give rise to a disqualifying financial interest where a particular matter would have a direct and predictable effect on the employee’s interest, but providing a regulatory exemption for participation in such a program so long as the program is open to the general public and participation involves no other financial interest).<sup>4</sup>

The law’s current treatment of defined benefit plans reinforces this conclusion. In September 1995, the OGE published a proposed regulation that contains an interpretation of section 208. 60 Fed. Reg. 47,208 (Sept. 11, 1995). The preamble to that proposed regulation, which this Office reviewed and approved, states that a defined benefit plan ordinarily will not give rise to a financial interest, because

[a]s a practical matter . . . most governmental matters in which an employee would participate are unlikely to have a direct and predictable effect on the plan sponsor’s ability or willingness to pay an employee’s pension benefits. Accordingly, most employees will not have a disqualifying financial interest in either the holdings or the sponsor of a defined benefit plan.

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<sup>3</sup> We do not mean to suggest that only matters that have the potential to render an airline unable to honor *all* flight privileges can create a disqualifying financial interest. A matter affecting an airline’s ability to honor *some part* of an employee’s flight privileges might also entail the potential for a monetary loss to the employee. For example, where an FAA employee regularly flies to a particular destination using flight privileges and a particular matter has the clear potential to affect the airline’s ability to honor flight privileges to that destination (a result that would require the employee to pay to fly to a destination to which he regularly flies for free), the employee would likely have a disqualifying financial interest.

<sup>4</sup> One might argue that flight privileges can never give rise to a *financial* interest because they are not a financial instrument (e.g., cash, stocks, bonds or mutual funds) or an investment vehicle (e.g., real estate). That argument, however, would have a faulty premise, as the question is not whether *flight privileges are financial*, but whether the *employee’s interest in a governmental matter is financial*. Thus, it is well-established that a financial interest in a matter may derive from a job offer or a law firm’s representation of a client, neither of which resembles financial instruments or investment vehicles, and yet both of which can give rise to a disqualifying financial interest in a governmental matter. *See* 5 C.F.R. § 2640.103(b) (“a disqualifying financial interest might derive from a salary . . . [or] job offer”); Memorandum for Arnold I. Burns, Deputy Attorney General, from Margaret C. Love, Special Counsel, Office of Legal Counsel, *Re: Waiver Under 18 U.S.C. 208(b)(1)* (Mar. 14, 1988) (law firm’s interest in litigation in which it is involved in a representative capacity may give rise to a financial interest that may be imputed to a government employee who has accepted a position with the firm).

*Id.* at 47,214; *see also* 5 C.F.R. pt. 2640 (final rule); Memorandum for Stephen D. Potts, Director, Office of Government Ethics, from Richard L. Shiffrin, Office of Legal Counsel (Sept. 17, 1996) (concurring in publication of final rule); Office of Government Ethics, *18 U.S.C. § 208 and Defined Benefit Pension Plans*, Informal Advisory Op. 99x6, at 3 (Apr. 14, 1999), *available at* <http://www.oge.gov/OGE-Advisories/Legal-Advisories/Legal-Advisories> (last visited May 24, 2013) (“*Defined Benefit Pension Plans*”) (“If an employee is assigned to participate in a particular matter that affects the sponsor of his defined benefit plan, the employee will not ordinarily have a disqualifying financial interest in his defined benefit plan under section 208, unless the matter would have a direct and predictable effect on the sponsor’s ability or willingness to pay the employee’s pension benefit.”); *id.* at 3 (“If [a matter] could result in the dissolution of the sponsor organization and in its subsequent inability to pay the employee’s pension, the employee’s interest in his pension would be a disqualifying financial interest under section 208.”); *id.* at 2; *cf.* *President Reagan’s Ability to Receive Retirement Benefits from the State of California*, 5 Op. O.L.C. 187, 190 (1981) (concluding that it would not violate the terms or spirit of Article II, Section 1, Clause 7 of the Constitution—which prohibits the President from receiving an emolument from a State while in office—for the President to receive a “pension in which he acquired a vested right six years before he became President, for which he no longer has to perform any services, and of which the State of California cannot deprive him”).

As you have described them, flight privileges resemble a “defined” benefit in the sense that matters here. Like the benefit provided under a defined benefit plan, the value of flight privileges does not generally fluctuate depending on the FAA’s regulatory treatment of the airline. Their value to the employee will, of course, be independently affected by the market price of air travel, just as the value of a defined benefit will rise or fall depending on the market performance of the benefit plan’s investments. But the right to realize that value is definite, subject only to the company’s ability to honor the privilege, just as a pension providing a defined benefit is definite, subject only to the company’s ability to honor its funding obligations. If defined benefit plans do not ordinarily give rise to a disqualifying financial interest in the plan’s sponsor, we have no reason to conclude that flight privileges will either.

The legislative history of section 208(a) offers further support for this conclusion. While Congress undoubtedly sought to reach genuine conflicts of interest in enacting section 208, nothing in the legislative history of section 208 suggests that Congress intended categorically to prevent government employees from participating in matters involving companies from which they receive retirement benefits. To the contrary, Congress was well aware that “legal protections against conflicts of interest must be so designed as not unnecessarily or unreasonably to impede the recruitment and retention by the Government of those men and women who are most qualified to serve it.” H.R. Rep. No. 87-748, at 6 (1961). Our conclusion—

that flight privileges normally will not give rise to a disqualifying financial interest in an FAA matter—fully effectuates this intention.

A 1978 opinion of this Office on pension and welfare benefits does not alter our conclusion. In that opinion, we concluded that a government employee who continued to receive payments pursuant to the retirement program of his former law firm had a “financial interest” under section 208 in a matter in which the law firm represented a party. Memorandum for Barbara Allen Babcock, Assistant Attorney General, Civil Division, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Potential Conflict Presented by the Participation of Stephen J. Friedman on the Settlement Policy Committee* (Feb. 3, 1978). We interpreted section 208 to require disqualification in “any matter affecting a former employer whenever the Government official is continuing to participate in a welfare or benefit plan maintained by that employer, whether or not the employer continues to make contributions—unless the official first obtains an exemption pursuant to § 208(b).” *Id.* at 9 (footnote omitted). The 1978 opinion was based on the erroneous view that section 208(a) “requires that we look to more than merely the eventual financial impact the governmental matter may have on the employee.” *Id.* at 6. “It is appropriate,” we reasoned, “to consider as well the financial nexus the employee has with an entity that may be affected by the governmental matter, even if the nexus is such that the financial impact on the entity will not be passed through to the individual employee.” *Id.* (emphasis added). The 1978 opinion is inconsistent with the direct and predictable effect requirement subsequently adopted by OGE in its regulations and long approved by this Office. It is also inconsistent with the language of section 208 itself, which clearly requires disqualification only where a decision in the “particular matter” at issue has the potential to affect the individual employee’s financial interests. For these reasons, we are constrained to repudiate our 1978 opinion.

## II.

You next ask whether flight privileges constitute an interest that must be analyzed under an OGE regulation, 5 C.F.R. § 2635.502(a) (2003). That regulation states that

[w]here an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agen-

cy designee of the appearance problem and received authorization from the agency designee.

*Id.* Under section 2635.502(a), as relevant here, an employee's circumstances must satisfy two elements before the regulation counsels the employee either to decline to work on the matter or to obtain authorization from the agency designee: (1) the employee must know that a person with whom he has a covered relationship is a party or a party's representative in a particular matter, and (2) the employee or his agency must determine that a reasonable person would question his impartiality if he participates in that matter.<sup>5</sup>

In our view, an employee who holds flight privileges and the airline that provided the flight privileges would have a "covered relationship." According to the regulation, "[a]n employee has a *covered relationship* with," among other people, "(i) [a] person . . . with whom the employee has . . . a business, contractual or other financial relationship that involves other than a routine consumer transaction . . . [and] (iv) [a]ny person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee . . ." 5 C.F.R. § 2635.502(b) (emphasis added). A flight privileges arrangement would qualify as a "contractual . . . relationship" under section 2635.502(b)(i), because we understand that flight privileges are granted under a contract or a benefit plan, or are otherwise subject to contractual terms. As that relationship would involve "other than a routine consumer transaction"—airlines, after all, do not routinely offer consumers free flight privileges—the FAA employee who holds flight privileges and the airline that provided them would have a "covered relationship" within the meaning of the regulation.

The OGE's informal guidance in this area further supports this construction of the regulation. OGE has stated that "[u]nder 5 C.F.R. § 2635.502(b)(1)(i), . . . [a] vested interest in a defined benefit plan funded and maintained by a former employer *would* create a covered relationship," an interpretation that applies with equal force to flight privileges. *Defined Benefit Pension Plans* at 3 n.3 (emphasis added); cf. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (an agency's interpretation of its own regulations is entitled to "controlling weight unless it is plainly erroneous or inconsistent with the regulation").

Whether flight privileges would create an appearance problem, satisfying the second element of the regulation, is not a question we can answer in the abstract. As OGE has advised, "OGE is not in a position to decide for an agency whether a reasonable person would question the impartiality of [an] employee's participation in a particular matter." Office of Government Ethics, *Receipt of Outside Awards*

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<sup>5</sup> Although the first element is also satisfied if the employee knows that the particular matter is likely to have a direct and predictable effect on the financial interest of a member of his household, the analysis of that alternative would largely overlap our analysis of the criminal conflict of interest statute in Part I above.

by *Employees and Outside Activities by Employees*, Informal Advisory Op. 00x4, at 4 (Apr. 11, 2000), available at <http://www.oge.gov/OGE-Advisories/Legal-Advisories/Legal-Advisories> (last visited May 24, 2013). The same generally holds for this Office; the question of an appearance problem is best left to the employee and the agency based on the facts of a particular case. *See id.*; Office of Government Ethics, *Covered Relationship With Private Partner*, Informal Advisory Op. 93x25, at 2 (Oct. 1, 1993), available at <http://www.oge.gov/OGE-Advisories/Legal-Advisories/Legal-Advisories> (last visited May 24, 2013).<sup>6</sup>

### III.

You also ask whether flight privileges are an interest that must be analyzed under 5 C.F.R. § 2635.503 (2003), an OGE regulation that generally prohibits a government employee from participating, for two years, in matters involving his former employer if the employee received an extraordinary payment from that employer prior to entering government service. An “extraordinary payment” is

any item, including cash or an investment interest, with a value in excess of \$10,000, which is paid:

- (i) On the basis of a determination made after it became known to the former employer that the individual was being considered for or had accepted a Government position; and
- (ii) Other than pursuant to the former employer’s established compensation, partnership, or benefits program. A compensation, partnership, or benefits program will be deemed an established program if it is contained in bylaws, a contract or other written form, or if there is a history of similar payments made to others not entering into Federal service.

*Id.* § 2635.503(b)(1).

Under the plain terms of the regulation, flight privileges can be a prohibited type of “payment.” While the term “payment” ordinarily suggests money or some

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<sup>6</sup> We note that under the OGE regulations an agency need not wait for an employee to determine whether a covered relationship would cause a reasonable person to question his impartiality. Section 2635.502(c) says that “the agency designee may make an independent determination” about impartiality “at any time” and “on his own initiative.” 5 C.F.R. § 2635.502(c) (emphasis added).

Some might argue that an appearance problem could arise if a high percentage of FAA employees held privileges not generally available to the public from the industry regulated by the FAA, but we do not address the possible collective effect that widespread flight benefits among FAA employees might be perceived to have. The legal standards discussed in this memorandum turn on analysis of individual employees’ personal interests, and there is no concept in the applicable laws of an “agency conflict of interest.” Any effect that might be perceived because of the aggregation or widespread holding of individuals’ financial interests is an issue for policy makers to consider.

other financial instrument, it also encompasses “compensation.” *Webster’s Third New Int’l Dictionary of the English Language Unabridged* 1659 (2002) (“payment . . . : the act of paying or giving compensation . . .”). And there is no reason that an airline employee could not be compensated with flight privileges. Moreover, the regulation states that “*any item . . . with a value in excess of \$10,000*” may constitute an extraordinary payment, not just cash or financial instruments. Thus, it is the value, timing and extraordinary nature of a “payment” that brings the payment within the regulation’s orbit, not its form. Granting privileges—whether flight privileges, country club privileges, or any other valuable privileges—as a reward for accepting a government position would pose no less of an impartiality problem than making an equivalent cash payment.

While flight privileges can qualify as a type of *payment*, and therefore must be analyzed under the regulation, we conclude that retiree flight privileges do not meet the regulation’s definition of *extraordinary* payment. *First*, we understand that flight privileges are an *ordinary* benefit within the industry, not one awarded “on the basis of a determination made after” a former employer learns that an individual may enter government service. We are told that the FAA has sought our opinion in part because uncertainty about the ethical implications of flight privileges has impeded the FAA’s ability to recruit former airline industry employees who are already entitled to such privileges and are free to use them if they choose not to enter government service. *Second*, flight privileges are earned under an “established . . . benefits program,” 5 C.F.R. § 2635.503(b)(1)(ii), because, according to your letter, there is a history of granting them to retiring airline employees who are not entering federal service. *See also* 57 Fed. Reg. 35,006, 35,028 (Aug. 7, 1992) (OGE rejecting a proposal to define “extraordinary payment” to include payments made under an employment contract or employee benefits plan).<sup>7</sup>

#### IV.

Lastly, you ask whether flight privileges qualify as “stock” or “any other securities” within the meaning of 5 C.F.R. § 6001.104(b) (2003), which forbids FAA employees, their spouses and their minor children to “hold stock or have any other securities interest in an airline.”

Under any conventional standard of meaning, flight privileges do not qualify as “stock or . . . any other securities interest.” “Stock” represents an equity interest in a company, while flight privileges entail no such ownership interest, but merely the privilege of flying for free. Nor do flight privileges qualify as “any other

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<sup>7</sup> For the same reason, an FAA employee’s use of flight privileges that were earned by virtue of prior employment with the airline and that are available to all similarly situated retirees pursuant to the general retirement benefit policy of the airline, regardless of subsequent government employment, would not constitute a “gift” prohibited by the ethics rules. *See* 5 C.F.R. § 2635.203(b)(6) (2003).

securities interest,” as they are not an investment of any kind—either in form or in economic substance. See Securities Act of 1933, Pub. L. No. 73-22, § 2(1), *as amended*, 15 U.S.C. § 77b(a)(1) (2000) (“The term ‘security’ means any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a ‘security,’ or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.”); *SEC v. Edwards*, 540 U.S. 389, 393 (2004) (explaining that under “[t]he test for whether a particular scheme is an investment contract,” and therefore is a “security,” “[w]e look to ‘whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others’”) (quoting *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946)); *Int’l Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 553 (1979) (holding that a non-contributory, mandatory pension plan did not constitute a “security” under the Securities Act of 1933 or the Securities Exchange Act of 1934 because there was no “investment of money”); *id.* at 559–60 (“In every decision of this Court recognizing the presence of a ‘security’ under the Securities Acts, the person found to have been an investor chose to give up a specific consideration in return for a separable financial interest with the characteristics of a security.”).

Context bolsters this conclusion. A different section of the regulation, section 6001.104(a), provides that no Federal Railroad Administration (“FRA”) employee may “hold stock or have any other *financial* interest, including outside employment, in a railroad company.” 5 C.F.R. § 6001.104(a) (emphasis added). By broadly prohibiting FRA employees from holding any *financial* interest in a railroad, while narrowly prohibiting FAA employees from holding any *securities* interest in an airline, the regulation confirms that the FAA limitation incorporates only a narrow subset of financial interests and that it excludes non-securities interests like flight privileges.

STEVEN G. BRADBURY

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## Authority of HUD's Chief Financial Officer to Submit Final Reports on Violations of Appropriations Laws

The Consolidated Appropriations Resolution for Fiscal Year 2003 requires the Chief Financial Officer of the Department of Housing and Urban Development to report to the President and Congress on violations by the agency of the Anti-Deficiency Act and other appropriations laws concerning expenditures, but the CFO must first submit his reports to the Secretary of HUD for review and approval.

August 31, 2004

### MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

You have asked for our opinion concerning the proper interpretation of an appropriations statute that directs the Chief Financial Officer (“CFO”) of the Department of Housing and Urban Development (“HUD”) to submit final reports to the Secretary of HUD, the President, and Congress concerning violations of the Anti-Deficiency Act (“ADA”) and other statutes relating to HUD appropriations. In particular, you have inquired whether this legislation overrides language in the ADA that directs “the head of the agency” to report ADA violations to the President and Congress and, if so, whether the CFO may submit reports on ADA violations without first seeking the review and approval of HUD’s Secretary. We conclude that the appropriations statute at issue does require the CFO to report to the President and Congress on violations of the ADA and other applicable appropriations statutes, but that he must first submit his reports to the Secretary for review and approval.

The ADA provides in relevant part that executive branch officials may not expend funds or enter into contracts that impose financial obligations on the United States without express congressional authorization in appropriations legislation. 31 U.S.C. § 1341(a)(1) (2000); *see also id.* §§ 1341–1342, 1349–1351, 1511–1519. Violations of the ADA—which enforces the Constitution’s directive that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law,” U.S. Const. art. I, § 9, cl. 7—require “appropriate administrative discipline,” including possible reprimand, suspension without pay, or removal from office, and, if the violation is knowing and willful, may result in a fine or imprisonment. 31 U.S.C. §§ 1349(a), 1350.

To ensure that the President and Congress are made aware of violations of the Act, Congress directed that “[i]f an officer or employee of an executive agency . . . violates section 1341(a) or 1342 of this title, the head of the agency . . . shall report immediately to the President and Congress all relevant facts and a statement of actions taken.” 31 U.S.C. § 1351. Under the ADA, therefore, the heads of the executive agencies bear responsibility for reporting violations of the ADA to the President and Congress.

In 2003, Congress established specific additional parameters for HUD's reporting of violations of the ADA and other statutes authorizing obligation of HUD funds. In the Consolidated Appropriations Resolution for Fiscal Year 2003 ("FY 2003 Appropriations Act" or "2003 Act"), Congress subjected the appropriation of funds for administrative and other expenses of HUD's CFO to the following conditions:

*Provided further, That, notwithstanding any other provision of law, hereafter, the Chief Financial Officer of the Department of Housing and Urban Development shall, in consultation with the Budget Officer, have sole authority to investigate potential or actual violations under the Anti-Deficiency Act (31 U.S.C. 1341 et seq.) and all other statutes and regulations related to the obligation and expenditure of funds made available in this, or any other Act; shall determine whether violations exist; and shall submit final reports on violations to the Secretary, the President, the Office of Management and Budget and the Congress in accordance with applicable statutes and Office of Management and Budget circulars.*

Pub. L. No. 108-7, 117 Stat. 11, 499 (2003) (emphasis added).

The question at issue focuses, first, on the relation between the reporting requirements of the FY 2003 Appropriations Act and those of the ADA—in particular, whether the 2003 Act vests HUD's CFO with authority, *independent* of the Secretary, to report ADA violations to the President and Congress. More generally, in addressing your question, we must consider the relation between the reporting authority of the CFO under the 2003 Act and the supervisory authority of the Secretary of HUD, and ultimately of the President as the head of the Executive Branch. The General Counsel of HUD has provided his view that the FY 2003 Appropriations Act does not nullify the ADA's requirement that the "head of the agency" inform the President and Congress of any ADA violations, or that, at a minimum, the CFO's reports must first be reviewed and approved by the Secretary. See Letter for Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, from Richard A. Hauser, General Counsel, U.S. Department of Housing and Urban Development (May 10, 2004). For the reasons set forth below, we conclude that the FY 2003 Appropriations Act does require the CFO to report to the President and Congress on violations of the ADA and other applicable appropriations statutes, but that the CFO's reports are subject to prior review and approval by the Secretary or the President.<sup>1</sup>

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<sup>1</sup> We have not analyzed the question whether the reporting requirements set forth in the FY 2003 Appropriations Act are permanent requirements, but we are informed that HUD treats them as such. See E-mail for Steffen N. Johnson, Attorney-Adviser, Office of Legal Counsel, from Camille E. Acevedo, Associate General Counsel for Legislation and Regulations, Department of Housing and Urban Development (July 22, 2004). See also FY 2003 Appropriations Act, 117 Stat. at 499 (conditioning

In the FY 2003 Appropriations Act, Congress directed the CFO to submit his reports “in accordance with applicable statutes and Office of Management and Budget circulars.” 117 Stat. at 499 (emphasis added). Among the “applicable statutes” must be the ADA, 31 U.S.C. § 1351, which, as discussed above, imposes on “the head of the agency,” rather than the CFO, the responsibility of reporting ADA violations to the President and Congress. Chief among the applicable OMB circulars is Circular A-11, which implements the requirements of the ADA for the Executive Branch and specifies that reports of ADA violations are to take the form of letters that shall be transmitted from the “agency head” to the President through the Director of OMB. OMB Circular No. A-11, § 145.7 (2004). OMB Circular A-11 also directs the agency to “report identical letters to the Speaker of the House of Representatives and the President of the Senate,” and it specifies: “If the letters to Congress are identical to the letter to the President, include a statement to this effect in the letter to the President. If the letters to Congress are not identical to the letter to the President, you will submit a copy of the letter to Congress with your letter to the President.” *Id.* Thus, although the phrase “notwithstanding any other provision of law” in the 2003 Act would generally override other laws to the extent they interfere with the CFO’s exercise of his duties under the Act, that phrase cannot be read to override the terms of the ADA and OMB Circular A-11 entirely, because the requirement in the same provision that the CFO submit his final reports “in accordance with” applicable statutes and OMB circulars expressly preserves the procedures prescribed by the ADA and Circular A-11. *See Williams v. Taylor*, 529 U.S. 362, 364 (2000) (noting “the cardinal principle of statutory construction that courts must give effect, if possible, to every clause and word of a statute”).

On the other hand, the ADA and OMB Circular A-11 have general application to the deficiency reports of all executive agencies, whereas the 2003 Act is specific to HUD. It is a usual rule of construction that the specific statutory provision will trump the general where they conflict or address the same concern. *See Edmond v. United States*, 520 U.S. 651, 657 (1997) (“Ordinarily, where a specific provision conflicts with a general one, the specific governs.”); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (“[I]t is a commonplace of statutory construction that the specific governs the general.”). It is unlikely, in our view, that Congress intended to create two redundant reporting obligations for ADA violations at HUD, one requiring a report to be submitted by the Secretary under the general terms of the ADA and one requiring a separate and independent report

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certain HUD appropriations on the requirement that the CFO “hereafter” submit final reports on violations of the ADA and other appropriations statutes to the Secretary and the President as well as to Congress); H.R. Rep. No. 108-235, at 77–78 (2003) (describing the changes made in the FY 2003 Appropriations Act as “permanent changes” and stating that they “permanently clarif[ied] responsibilities within the Department for investigating and reporting on potential and actual violations of all appropriations laws”).

to be submitted by the CFO under the specific terms of the 2003 Act. The language in the 2003 Act requiring the CFO to “submit *final* reports on violations” reinforces the view that only one report on a given violation is contemplated by the statute. Accordingly, we conclude that the HUD-specific terms of the 2003 Act were intended to assign to the CFO the duty of submitting reports to the President and Congress with respect to violations at HUD of the ADA and other applicable appropriations laws.

But it does not necessarily follow that, simply because the 2003 Act charges the HUD CFO, rather than the Secretary of HUD, with the duty to submit final reports on violations, the HUD CFO has independent and unreviewable authority to prepare and submit final reports to the President and Congress without supervision by the Secretary. The language of the 2003 Act does not require such a reading, but rather is reasonably susceptible to the interpretation that the Secretary retains his ordinary supervisory authority over the CFO, as reflected in the statute spelling out the CFO’s authority and functions. *See* 31 U.S.C. § 902(a)(1) (2000) (the CFO shall “report directly to the head of the agency regarding financial management matters”). The need to avoid raising a significant constitutional problem requires that we adopt this interpretation—i.e., that the CFO’s duty to prepare and submit final reports under the 2003 Act, like his other duties, is subject to the ordinary supervision of the Secretary, and ultimately of the President through the Secretary. Accordingly, we conclude that although the CFO is assigned the responsibility for submitting reports to the President and Congress on all violations of appropriations laws at HUD, including the reports required by the ADA and OMB Circular A-11, the CFO’s exercise of that duty is subject to prior review and approval by the Secretary.<sup>2</sup>

This result follows from the rule of construction requiring that statutes be interpreted to avoid raising a significant constitutional problem, provided that doing so does not contravene the clear meaning of the statute. *See Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”) (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). Here, we conclude that it is most reasonable to construe the FY 2003 Appropriations Act to require supervisory review by the Secretary of the CFO’s reports to the President and Congress because a contrary conclusion would

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<sup>2</sup> The legislative history does not elaborate on the relationship between the reporting requirements of the ADA and those of the FY 2003 Appropriations Act. The House Conference Report, which reflects the conferees’ adoption of the House version of the bill, references an earlier House report that discusses HUD’s past difficulties in complying with the ADA, but neither document discusses the issue of reporting in any depth. *See* H.R. Conf. Rep. No. 108-10, at 1427 (2003); H.R. Rep. No. 107-740, at 78–79 (2002).

raise serious constitutional problems by interfering with the President's exercise of his constitutional responsibility to supervise the unitary Executive Branch.

The President's ability to supervise and control the work of subordinate officers and employees of the Executive Branch, through his supervision of the principal officers of the executive agencies, is vital to the exercise of his constitutional duty faithfully to execute the laws. *See* U.S. Const. art. II, § 3 (providing that the President "shall take Care that the Laws be faithfully executed"). As we have elsewhere explained:

The [judicial] decisions and the long practical history concerning the right of the President to protect his control over the Executive Branch are based on the fundamental principle that the President's relationship with his subordinates must be free from certain types of interference from the coordinate branches of government in order to permit the President effectively to carry out his constitutionally assigned responsibilities. The executive power resides in the President, and he is obligated to "take care that the laws are faithfully executed." In order to fulfill those responsibilities, the President must be able to rely upon the faithful service of subordinate officials. To the extent that Congress or the courts interfere with the President's right to control or receive effective service from his subordinates within the Executive Branch, those other branches limit the ability of the President to perform his constitutional function.

*Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress*, 6 Op. O.L.C. 632, 638–39 (1982).

Applying these general separation of powers principles, we have concluded that statutory "requirement[s] that subordinate officials within the Executive Branch submit reports directly to Congress, without any prior review by their superiors, would greatly impair the right of the President to exercise his constitutionally based right to control the Executive Branch," and that statutory reporting requirements should generally be construed to avoid such a result. *Id.* at 633. Similarly, we have concluded that inspectors general in the Executive Branch may not be required to report information to Congress without review and approval by the head of the relevant agency, explaining that "[r]eports of problems encountered . . . may be required of the agencies in question, but . . . the statutory head of the agency . . . must reserve the power of supervision over the contents of those reports." *Inspector General Legislation*, 1 Op. O.L.C. 16, 18 (1977). *See also Authority of the Special Counsel of the Merit Systems Protection Board to Litigate and Submit Legislation to Congress*, 8 Op. O.L.C. 30, 31 (1984) ("Congress may not grant [Special Counsel] the authority to submit legislative proposals directly to Congress without prior review and clearance by the President, or other appropriate authority, without raising serious separation of powers concerns"). Thus, it would

be constitutionally problematic to interpret the FY 2003 Appropriations Act to grant HUD's CFO unreviewable authority to report to the President and Congress concerning potential violations of the ADA and other appropriations laws.<sup>3</sup> Because the plain terms of the 2003 Act, including its directive that reports be submitted "in accordance with" applicable statutes and OMB circulars, do not require such an interpretation, it must be avoided. The better reading of the statute is that the reports prepared by the CFO must be subject to the review and approval of the Secretary before they are finalized and submitted by the CFO to the President and Congress.<sup>4</sup>

In summary, we conclude that the FY 2003 Appropriations Act does give the CFO of HUD authority to report to the President and Congress on violations by the agency of the ADA and other appropriations laws concerning expenditures, but that he must first submit his reports to the Secretary for review and approval.

STEVEN G. BRADBURY

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Office of Legal Counsel*

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<sup>3</sup> The same fundamental constitutional concern would be raised by a statute requiring a principal officer like the Secretary to make a report directly to Congress without prior review and approval by the President. We note that the ADA itself could be read to suggest such a requirement, though such a problematic interpretation of the ADA is not required by the plain language of the statute. Of course, the President, in his discretion, may permit the heads of departments to make simultaneous reports to Congress when they report ADA violations to the President through OMB, and that is the policy reflected in OMB Circular A-11.

<sup>4</sup> Our conclusion is not altered by the fact that the FY 2003 Appropriations Act provides that the CFO "shall . . . prescribe the content, format and other requirements for the submission of final reports on violations; and . . . prescribe such additional policies and procedures as may be required for conducting investigations of, and administering, processing, and reporting on, potential and actual violations of the Anti-Deficiency Act and all other statutes and regulations governing the obligation and expenditure of funds made available in this or any other Act." FY 2003 Appropriations Act, 117 Stat. at 500. These responsibilities of the CFO do not foreclose a substantive role for the Secretary in overseeing and directing the preparation of reports concerning violations of the appropriations laws. Although the CFO is charged in the first instance with preparing the content of his reports and establishing policies and procedures for reporting violations, we construe these responsibilities—like the CFO's other duties—to be subject to oversight by the President and the Secretary, for the reasons discussed in the text.

## Legality of EEOC's Class Action Regulations

The Office of Legal Counsel has the authority to resolve the legal questions the Postal Service raised with respect to the Equal Employment Opportunity Commission's class action regulations.

The Equal Employment Opportunity Commission's class action regulations applicable to administrative complaints against federal government agencies are not contrary to Title VII in the manners suggested by the United States Postal Service: the regulations do not purport to prevent claimants from filing actions in federal court; they do not frustrate the statutory exhaustion requirement; and they do not forestall the running of the limitations period.

September 20, 2004

### MEMORANDUM OPINION FOR THE VICE PRESIDENT AND GENERAL COUNSEL UNITED STATES POSTAL SERVICE

You have asked whether certain class action regulations promulgated by the Equal Employment Opportunity Commission ("EEOC") applicable to administrative complaints against federal government agencies are contrary to Title VII of the Civil Rights Act of 1964. We conclude that they are not inconsistent with Title VII in the manners you suggest.

#### I.

We begin with a brief overview of the applicable statutory and regulatory provisions at issue. Section 2000e-16 of title 42, U.S. Code, provides that personnel actions of the federal government, including those of the United States Postal Service ("USPS"), "shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a) (2000). Section 2000e-16 then specifically assigns the EEOC the authority to enforce this requirement:

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies . . . and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section.

*Id.* § 2000e-16(b). In pursuance of this authority, the EEOC has created a detailed administrative procedure for resolving claims of discrimination by federal employees or applicants for federal employment, including hearings before administrative law judges and appeals to the EEOC itself. The complaining employee or applicant may, subject to conditions, seek relief in the federal courts if he is dissatisfied with the results of this administrative process. *Id.* § 2000e-

16(c). An agency, however, may not seek judicial review of the decisions of the EEOC. *See id.* § 2000e-16(b), (c).

Your specific questions involve the EEOC's administrative process for resolving class action complaints. *See* 29 C.F.R § 1614.204 (2003). This process begins when an aggrieved individual, after completing a counseling process, files a class complaint with the agency that allegedly discriminated against him. *See id.* § 1614.204(b), (c). The agency then has thirty days to forward the complaint to the EEOC, which assigns the complaint to an administrative judge. *Id.* § 1614.204(d). The administrative judge first must decide whether to recommend certification of the class, which he may do if the proposed class meets the requirements of numerosity, commonality and typicality, and if the complainant who is the proposed agent for the class will "fairly and adequately protect the interests of the class." *Id.* § 1614.204(a)(2), (d)(2). Once the administrative judge makes his recommendation, the agency must, within forty days, decide whether or not to accept the complaint. *Id.* § 1614.204(d)(7). If the agency dismisses the class complaint, the complainant may appeal to the EEOC or file a civil action. *Id.* If the agency accepts the class complaint, it must notify the class members. *Id.* § 1614.204(e).

Discovery then begins and lasts not less than sixty days. *Id.* § 1614.204(f). Once discovery has concluded, the administrative judge conducts a hearing and issues a report and recommendations on the merits of the complaint. *Id.* § 1614.204(h), (i). Upon receipt of this report, the agency has sixty days to issue a "final decision" stating whether it will "accept, reject, or modify the [administrative judge's] findings." *Id.* § 1614.204(j)(1). This "final decision . . . shall, subject to subpart D of this part [addressing the appeal rights of the complainant and the agency], be binding on all members of the class and the agency." *Id.* § 1614.204(j)(6). The agency must then notify the complainants of its final decision, as well as of their appeal rights under subpart D. *Id.* § 1614.204(j)(7), (k). Where the agency has found discrimination, members of the class may then file claims for individual relief. *Id.* § 1614.204(l).

If the class agent or any member who has filed a claim for individual relief is unsatisfied with the final action of the agency, he may either appeal to the EEOC or file a civil action in federal court. *Id.* §§ 1614.401(c), 1614.407. In addition, if at any time during this process, more than 180 days has passed since the filing of the initial complaint, an individual or the class may file an action in federal court. *Id.* § 1614.407. With respect to appeals to the EEOC, the EEOC has delegated the responsibility for handling them to the Office of Federal Operations ("OFO"). *Id.* § 1614.403–405. There is no time limit in which the OFO must act; however, 180 days after the filing of the appeal, the class or a member who has filed a claim for individual relief may file a civil action in federal court. *Id.* § 1614.407(d). Alternatively, the class may await the decision of the OFO and, if dissatisfied, may file a civil action within ninety days of that decision. *Id.* § 1614.407(c). The

agency is not authorized to proceed in federal court should it be dissatisfied with the results of the administrative process. *See id.* §§ 1614.407, 1614.502.

The class agent and the agency may resolve the complaint by written agreement at any time. *Id.* § 1614.204(g)(2), (3). Notice of the resolution must be provided to all class members, who may then petition to have the resolution vacated on the ground that it is “not fair, adequate and reasonable to the class as a whole.” *Id.* § 1614.204(g)(4). The administrative judge considers these petitions. If he finds that the resolution is fair, adequate and reasonable, then the resolution binds all members of the class. *Id.* If, on the other hand, the administrative judge determines that the proposed resolution is unfair to the class as a whole, he vacates the resolution and restarts the adjudicatory process. *Id.*

With this statutory and regulatory background in mind, we now turn to the legal questions presented by your request.

## II.

We first address the EEOC’s arguments that, under Executive Orders 12067 and 12146, we should refrain from resolving the legal questions you raise. For the reasons explained below, we conclude that neither argument establishes that this Office lacks the authority to resolve the legal questions here presented.

### A.

The EEOC first argues that section 1-307 of Executive Order 12067 prohibits this Office from addressing the merits of the legal questions at issue. Section 1-307(b) provides:

Whenever a dispute which cannot be resolved through good faith efforts arises between the Equal Employment Opportunity Commission and another Federal department or agency concerning the issuance of an equal employment opportunity rule, regulation, policy, procedure, order or any matter covered by this Order, the Chairman of the Equal Employment Opportunity Commission or the head of the affected department or agency may refer the matter to the Executive Office of the President. Such reference must be in writing and may not be made later than 15 working days following receipt of the initiating agency’s notice of intent publicly to announce an equal employment opportunity rule, regulation, policy, procedure or order. If no reference is made within the 15 day period, the decision of the agency which initiated the proposed issuance will become effective.

Exec. Order No. 12067, 3 C.F.R. § 208 (1979). The EEOC argues that USPS “should not be permitted to raise a matter under the general dispute resolution mechanism of E.O. 12146 that could have and should have been raised under the

more specific process for resolving disputes between agencies over EEO-related regulations” set forth in section 1-307(b). Letter for Noel J. Francisco, Deputy Assistant Attorney General, Office of Legal Counsel, from Peggy R. Mastroianni, Associate Legal Counsel, Equal Employment Opportunity Commission, *Re: EEOC's Class Complaint Regulation* at 2 (Nov. 14, 2003) (“EEOC Letter”).

We disagree with the EEOC's interpretation of Executive Order 12067. The EEOC's argument appears to rest on the assumption that section 1-307 sets forth the exclusive mechanism by which an agency may challenge an equal employment opportunity rule, regulation, policy, procedure or order. Were this true, then, for example, the only recourse open to an agency that has, after issuance and in light of practical experience, come to believe that a particular regulation reflects bad public policy, would be to seek an amendment to the Executive Order. It could not simply seek to have that regulation withdrawn or amended through ordinary interagency processes, since, under the EEOC's view of Executive Order 12067, such processes would be precluded by operation of section 1-307(b). Nothing in section 1-307(b) requires such a result. Rather, section 1-307(b) simply establishes a process that must be followed before a proposed rule or regulation can take effect. As the last sentence of that section states, “[i]f no reference is made within the 15 day period, the decision of the agency which initiated the proposed issuance will become effective.” Section 1-307(b) does not, however, preclude an agency from challenging a rule or regulation—be it on policy or legal grounds—after the regulation has been issued.<sup>1</sup>

We thus conclude that section 1-307 poses no bar to our addressing the legal questions you have raised.

## **B.**

The EEOC also argues that this Office lacks authority to address the questions presented under Executive Order 12146. Sections 1-401 and 1-402 of that Order provide:

### 1-4. Resolution of Interagency Legal Disputes

1-401. Whenever two or more Executive agencies are unable to resolve a legal dispute between them, including the question of which has jurisdiction to administer a particular program or to regulate a

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<sup>1</sup> Although we have not previously addressed the issue raised by the EEOC here, we have in the past responded to requests for opinions that challenged EEOC regulations after they had been issued. *See, e.g., Authority of the Equal Employment Opportunity Commission to Impose Monetary Sanctions Against Federal Agencies for Failure to Comply With Orders Issued by EEOC Administrative Judges*, 27 Op. O.L.C. 24 (2003) (discussing whether the EEOC has the authority to award attorney's fees against an agency as the EEOC had pursuant to 29 C.F.R. § 1614.109 and Management Directive 110).

particular activity, each agency is encouraged to submit the dispute to the Attorney General.

1-402. Whenever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is a specific statutory vesting of responsibility for a resolution elsewhere.

Exec. Order No. 12146, 3 C.F.R. § 411 (1980). The EEOC makes two arguments with respect to section 1-4 of this Executive Order, both of which we find unpersuasive.

First, the EEOC argues that section 1-402 is inapplicable because the Postmaster General “does not serve at the pleasure of the President.” EEOC Letter at 2. Even if so, section 1-402 does not prevent us from resolving the merits of this dispute. As we recently explained, section 1-402 does not prohibit an agency from requesting, or the Attorney General from rendering, an opinion properly requested pursuant to some other authority, such as section 1-401 of the Executive Order. *See Applicability of Anti-Discrimination Statutes to the Presidio Trust*, 28 Op. O.L.C. 84, 85–90 (2004) (“*Presidio Trust*”). Rather, “all that section 1-402 does is establish a requirement that agencies must satisfy before they are permitted to bring action in court.” *Id.* at 87. Thus, even if the head of the USPS does not serve at the pleasure of the President—a question on which we express no view—that would simply mean that the USPS is not bound by the procedural requirements of section 1-402. It would not, however, prevent the USPS from seeking our views or prohibit us from addressing the questions you have raised.

This brings us to the EEOC’s second argument: that we lack authority to resolve this issue under section 1-401 of the Executive Order because there is no unresolved dispute here within the meaning of that section. In particular, the EEOC states that “[a]lthough EEOC met with USPS last year to discuss our class complaint regulation, USPS did not raise any of the specific objections raised in its August 13 letter [to this Office].” EEOC Letter at 2. Thus, explains the EEOC, “[n]ot only has there been no attempt to resolve the ‘dispute’ at hand, EEOC did not learn of USPS’[s] allegation that our class complaint regulation violates Title VII until we received a copy of their letter from your office.” *Id.* We would, of course, encourage agencies to attempt to resolve legal disputes amongst themselves prior to seeking the views of this Office. But the failure to do so does not deprive us of authority under section 1-401 to render an opinion on the legal questions that USPS has presented. Nothing in section 1-401 establishes a procedure by which agencies must attempt to resolve a dispute before seeking an opinion from the Attorney General: all that is required by that section is the presence of a legal dispute that they have been “unable to resolve.” And here, the letters to us from the EEOC and the USPS make clear that these agencies have

been “unable to resolve” the question whether the EEOC’s class action regulations are contrary to Title VII. *Compare* Letter for M. Edward Whelan III, Acting Assistant Attorney General, Office of Legal Counsel, from Mary Anne Gibbons, Vice President and General Counsel, United States Postal Service, *Re: EEOC Class Actions* at 1 (Aug. 13, 2003) (“USPS Letter”) (“The Commission’s class action regulations are invalid because they are contrary to three fundamental principles embodied in Title VII of 1964.”), *with* EEOC Letter at 3 (“We believe that USPS is misinterpreting our regulation, and disagree with their allegations that our regulation conflicts with Title VII.”). *See also* *Presidio Trust*, 28 Op. O.L.C. at 86 n.4 (noting that “as the submissions to us from the Trust and the EEOC make clear, the Trust and the EEOC have not resolved their dispute on this broader legal issue”) (internal citation omitted).

We therefore reject the view that USPS’s failure to raise with the EEOC the legal basis for its challenge before coming to us deprives us of the authority to resolve this ongoing dispute.

### III.

We now turn to the merits of the legal questions you have raised. In particular, you have challenged the EEOC’s class action regulations as “contrary to three fundamental principles embodied” in Title VII, the statutory scheme they are intended to enforce. USPS Letter at 1. First, you state that the regulations purport to bind complainants to EEOC determinations in violation of their statutory right to bring an action in federal court once they have exhausted their administrative remedies. *Id.* at 1, 2–4. Second, you state that the regulations are inconsistent with applicable exhaustion requirements because they frustrate the agency’s ability to resolve administrative complaints and because they create the possibility that class members will be able to sue in federal court without having filed an administrative complaint. *Id.* at 1, 4–7. And third, you state that the regulations are inconsistent with the applicable statute of limitations, again because, by creating the possibility that class members will be able to sue in federal court without having filed an administrative complaint and by failing to provide for notice of final agency action to non-filing members, they forestall the running of the statutory limitations period with respect to such members. *Id.* at 1, 7–8. For the reasons explained below, we do not believe that the EEOC’s class action regulations are inconsistent with Title VII in the manners you suggest.<sup>2</sup>

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<sup>2</sup> Our opinion is limited to whether EEOC’s class action regulations are contrary to the statute on the three bases you indicate; we do not address here any other possible grounds for challenging the regulations.

A.

Resolution of the legal issues presented here is guided by the administrative law principles applied by the Supreme Court in *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Court's recent extended application of the doctrine first set out in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). In *Mead*, the Court addressed both the circumstances in which deference under *Chevron* is owed to an agency's implementation of a statute as well as the substantive scope of that deference.

With respect to the former, the Court explained that *Chevron* deference is due where "the agency's generally conferred authority and other statutory circumstances" suggest that "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law." *Mead*, 533 U.S. at 229. Paradigmatic of such circumstances are "express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." *Id.* As the Court summarized:

[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.

*Id.* at 226–27; *see also id.* at 230 ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force . . . . Thus, the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.").

Notice-and-comment rulemaking, however, is not a prerequisite for *Chevron* deference, provided that "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority," a delegation, the Court explained, that "may be shown in a variety of ways." *Id.* at 226–27. In *Mead*, the Court thus observed that "as significant as notice-and-comment rulemaking is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded." *Id.* at 230–31. *Cf. Auer v. Robbins*, 519 U.S. 452, 461 (1997)

(An agency's "interpretation of [its own regulations] is . . . controlling unless 'plainly erroneous or inconsistent with the regulation.' "). And even where an agency rule does not qualify for *Chevron* deference, it still may be entitled to deference under a lesser standard. *See Mead*, 533 U.S. at 234–35.

Where *Chevron* deference is due, the Court explained that the scope of an agency's regulatory authority is broad indeed:

When Congress has 'explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,' and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.

*Mead*, 533 U.S. at 227 (quoting *Chevron*, 467 U.S. at 843–44); *see also id.* at 229 (where *Chevron* deference is due, "a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise, but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable").

Here, it is clear that the EEOC's class action regulations are entitled to *Chevron* deference: Congress has specifically authorized the EEOC "to enforce the provisions of subsection (a) of this section through appropriate remedies . . . and . . . issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section," 42 U.S.C. § 2000e-16(b), and in furtherance of this authority, the EEOC promulgated these regulations pursuant to notice-and-comment rulemaking, in which federal government agencies fully participated. *See* 57 Fed. Reg. 12,634 (Apr. 10, 1992); 64 Fed. Reg. 37,644 (July 12, 1999).<sup>3</sup> It is for this reason, perhaps, that you have not suggested that these regulations are "procedurally defective" or "arbitrary or capricious in substance." *Mead*, 533 U.S. at 227. The question before us, then, is whether they are "manifestly contrary to the statute" that they are intended to

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<sup>3</sup> It is true that the Supreme Court has not accorded *Chevron* deference to certain of the EEOC's substantive regulations. *See, e.g., EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976). But that is because "Congress, in enacting Title VII, did not confer upon the EEOC" such authority. *Arabian Am. Oil Co.*, 499 U.S. at 257 (quoting *Gen. Elec. Co.*, 429 U.S. at 141). Here, the EEOC's regulations are procedural in nature, and Congress has expressly granted the EEOC the authority "to enforce the provisions of subsection (a) of this section through appropriate remedies . . . and . . . issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section." 42 U.S.C. § 2000e-16(b). *See also Edelman v. Lynchburg Coll.*, 535 U.S. 106, 113 (2002) (noting that "[t]he first [threshold question] is whether the [EEOC's] rulemaking exceeded its authority to adopt 'suitable procedural regulations,' 42 U.S.C. § 2000e-12(a), and instead addressed a substantive issue over which the EEOC has no rulemaking power") (citations omitted); *id.* at 122–23 (O'Connor, J., concurring).

implement in any of the three ways you have indicated. *Id.* It is to these questions that we now turn.

## **B.**

You have asserted three ways in which you believe that the EEOC's class action regulations are contrary to Title VII. We address each in turn.

### **1.**

You first state that the EEOC's regulations are inconsistent with Title VII because they purport to "bind" complainants when, pursuant to the statute, complainants may proceed in federal court if they are dissatisfied with the results of the administrative proceeding. USPS Letter at 1, 2–4. In particular, you note several portions of the class action regulations that state or suggest that class members are "bound" by the results of the administrative proceeding, including 29 C.F.R. § 1614.204(e)(2)(iii) (requiring the agency to provide complainants with "[a]n explanation of the binding nature of the [agency's] final decision or resolution of the complaint on class members"), 29 C.F.R. § 1614.204(g)(4) ("If the administrative judge finds that the resolution [of the complaint by the agency and the agent of the class] is fair, adequate and reasonable to the class as a whole, the resolution shall bind all members of the class."), and 29 C.F.R. § 1614.204(j)(6) ("A final decision on a class complaint shall, subject to subpart D of this part, be binding on all members of the class and the agency."). See USPS Letter at 2 (citing the foregoing authorities); see also *id.* at 2 n.5 (citing EEOC Management Directive ("MD") 110, ch. 8, § V.C ("The class members may not 'opt out' of the defined class"), available at <http://www.eeoc.gov/federal/md110/chapter8.html> (last visited Sept. 14, 2004)). In contrast, you note that Title VII expressly provides that "an employee or applicant for employment, if aggrieved by the final disposition of his complaint . . . may file a civil action" in federal district court. 42 U.S.C. § 2000e-16(c). It is your view that the former regulatory provisions are inconsistent with the latter statutory one.

We disagree. If the cited regulations purported to preclude a complainant from filing a civil action in federal district court, then your assertion might have merit. But they do not. Quite to the contrary, the regulations expressly permit the filing of an action by a complainant in federal court once administrative remedies are exhausted. They thus expressly provide that "[a] final decision on a class complaint shall, *subject to subpart D of this part*, be binding on all members of the class and the agency." 29 C.F.R. § 1614.204(j)(6) (emphasis added). Subpart D, in turn, details, in relevant part, the manner in which the complainant may file a civil action in federal district court. *Id.* § 1614.401–409. In particular, subpart D authorizes class agents and class members who have "filed an individual complaint [or] a claim for individual relief pursuant to a class complaint" to file an action directly

in federal court either within ninety days of receipt of notice of final agency action or 180 days after the date of filing the class complaint. *Id.* § 1614.407(a), (b). The regulation also recognizes the right to file a complaint in federal district court following the completion of the EEOC appeals process or 180 days after the filing of the appeal. *Id.* § 1614.407(c), (d).

To be sure, several of the EEOC's regulations refer to various aspects of the administrative process as "binding" complainants. But read in context—particularly in the context of the regulatory provisions expressly authorizing a complainant to bring a civil action in federal district court—it is evident that these references mean only that complainants are "bound" insofar as the administrative process is concerned.<sup>4</sup> Indeed, one of the regulations that you cite expressly so recognizes. *See id.* § 1614.204(j)(6) ("A final decision on a class complaint shall, *subject to subpart D of this part*, be binding on all members of the class and the agency.") (emphasis added); *see also id.* § 1614.204(j)(7) ("The final decision shall inform the agent of the right to appeal *or to file a civil action* in accordance with subpart D of this part and of the applicable time limits.") (emphasis added). And the other regulatory provisions that you cite in no way purport to close the federal court avenue that other regulatory provisions (and the statute) expressly recognize as open. In short, as the EEOC acknowledges, its "regulation is binding in the administrative, not the judicial, process." EEOC Letter at 4.

It may well be, as you state in your letter, that "[t]he Commission's intent to bind agencies to a class action process that cannot bind class members is contrary to the proper purpose of class action regulations," USPS Letter at 3, and we recognize that the ability of dissatisfied class members to bring suit in federal court may significantly hamper an agency's ability to resolve complaints on a truly class-wide basis. But the distinction between complainants and agencies is drawn in Title VII itself, which guarantees a right to proceed in federal court only to complainants. *See* 42 U.S.C. § 2000e-16(c). Nor are we entitled to second-guess EEOC policy choices made within the bounds of the law. It is the EEOC, and not this Office or the USPS, that Congress directed to "issue such rules, regulations, orders and instructions *as it deems necessary and appropriate* to carry out its responsibilities under this section." 42 U.S.C. § 2000e-16(b) (emphasis added).

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<sup>4</sup> This conclusion is true even with respect to an individual who did not file an administrative complaint that, had it been filed, would have been subsumed within a class complaint. If the EEOC were to reject the class complaint on the merits, and this individual were then to file an administrative complaint, then the individual likely would be "bound" by the EEOC's prior decision in the administrative context. In other words, the EEOC likely would reject this individual's complaint under principles of *res judicata*. *See* 29 C.F.R. § 1614.107(a)(1); *id.* § 1614.204(d)(2). Nothing in the EEOC's regulations, however, prohibits this individual from then proceeding to file an action in federal court. Likewise, nothing in those regulations prohibits a class member from filing a civil action if he is dissatisfied with a resolution of a class complaint approved by the administrative judge in accordance with 29 C.F.R. § 1614.204(g).

2.

You next assert that the EEOC's class action regulations frustrate the ability of agencies to resolve claims within the 180-day period that Congress prescribed. USPS Letter at 1, 4–7. You thus explain that, in your view, 42 U.S.C. § 2000e-16(c) reflects Congress's intention that an agency have the opportunity to resolve an employment discrimination claim within 180 days. That statutory provision provides that a complainant may file a civil action in federal district court "after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit . . . if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint." *Id.* The EEOC's class action regulations, you explain, frustrate an agency's ability to resolve a claim within this 180-day period in two distinct ways. We address each separately and conclude that neither demonstrates an inconsistency between the regulations and 42 U.S.C. § 2000e-16.

a.

The first way in which you believe that the EEOC's class action regulations are inconsistent with 42 U.S.C. § 2000e-16(c)'s 180-day period is that, where the administrative judge takes longer than 180 days to decide whether to certify a class, the practical effect of the regulations is to prevent an agency from considering the merits of individual claims of discrimination until after the 180-day period has run. In particular, MD 110 states that an "agency shall, within thirty (30) days of receipt of a decision dismissing a class complaint, . . . process . . . each individual complaint that was subsumed into the class complaint." MD 110, ch. 8, § III.C.<sup>5</sup> Since the regulations prescribe no time limit for the administrative judge's decision, it is possible that such decision will not issue until shortly before or even after the 180-day period has run. If so (and for purposes of this opinion, we will assume *arguendo* that this is a common scenario), then it is your contention that an individual complainant will be authorized to file a civil action in federal district court before the agency has ever had an opportunity to resolve the claim administratively.

The premise of this argument is that 42 U.S.C. § 2000e-16(c) accords an agency the right to address a complaint during the 180-day period. Even assuming

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<sup>5</sup> Unlike the EEOC's regulations, MD 110 was not promulgated pursuant to notice-and-comment rulemaking. We need not decide whether it is entitled to *Chevron* deference, however, because, for the reasons set forth in text, we believe it clear that the quoted provision is consistent with 42 U.S.C. § 2000e-16(c)'s 180-day rule, *see Edelman*, 535 U.S. at 114 ("Because we so clearly agree with the EEOC, there is no occasion to defer and no point in asking what kind of deference, or how much."), and because the USPS has identified no other basis upon which the portion of the management directive that it cites could be called into question.

*arguendo* that this interpretation of that provision is an accurate one,<sup>6</sup> there simply is nothing in EEOC regulations or MD 110 that precludes an agency from acting upon a class complaint or an individual complaint subsumed therein within the 180-day period, regardless of whether an administrative judge has rendered the class certification decision. With respect to individual complaints, the EEOC regulations generally require an agency to act within 180 days. *See* 29 C.F.R. § 1614.108(e). All that MD 110 does is relieve the agency of this obligation with respect to class complaints and individual complaints subsumed therein, replacing it with the obligation to act “within thirty (30) days of receipt of a decision dismissing a class complaint.” MD 110, ch. 8, § III.C. Nothing in the regulations or MD 110, however, prohibits the agency from acting sooner, as the EEOC acknowledges. *See* EEOC Letter at 6–7 (“[T]he agency can always attempt to resolve the class complaint during the first 180 days that it is pending.”).<sup>7</sup>

**b.**

Second, you believe that individuals who do not file administrative complaints may, under the EEOC's regulations, be entitled to initiate a civil action in federal district court, again preventing the agency from ever having an opportunity to resolve that complaint administratively. This argument, as we understand it, is predicated on the notion that an individual who, had he filed an administrative complaint, would have been subsumed into the certified class, but who does not in fact file an administrative complaint, would be allowed to initiate a suit in district court in the same manner as those class members who did file administrative claims. This argument, again, as we understand it, is predicated upon the so-called “single-filing rule,” pursuant to which lower federal courts have allowed an individual who did not file an administrative complaint to join the civil suit of another individual who did exhaust the administrative process, where the claims of the two individuals are sufficiently similar. *See, e.g., Snell v. Suffolk Cnty.*, 782 F.2d 1094, 1100–02 (2d Cir. 1986); *De Medina v. Reinhardt*, 686 F.2d 997, 1012–13 (D.C. Cir. 1982); *Ezell v. Mobile Housing Bd.*, 709 F.2d 1376, 1380–81 (11th Cir. 1983); *Greene v. City of Boston*, 204 F. Supp. 2d 239, 241–43 (D. Mass. 2002).

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<sup>6</sup> It is not at all clear that this assumption is a correct one. The EEOC argues that 42 U.S.C. § 2000e-16(c) is simply a “restriction on the employee’s right to file suit,” EEOC Letter at 5; it does not, in other words, entitle or require an agency to do anything. We need not resolve this issue, however, because even assuming *arguendo* that USPS’s characterization of section 2000e-16(c) is correct, it is not in conflict with EEOC’s class action regulations.

<sup>7</sup> It is true that some EEOC administrative decisions suggest that the normal course of action is for an agency to consider the merits of the complaint after the certification issue is decided. *See, e.g., Fosnacht v. Apfel*, Appeal No. 01992528, 2000 WL 361743 (EEOC Mar. 29, 2000); *Travis v. Potter*, Appeal No. 01992222, 2002 WL 31359446 (EEOC Oct. 10, 2002). These decisions, however, did not address whether, much less hold that, an agency is prohibited from acting until after it receives the class certification decision.

Again, however, this argument points to no inconsistency between the EEOC's class action regulations and Title VII. The only individuals EEOC's class action regulations specifically authorize to initiate an action in federal court are those who file individual complaints, those who file class complaints, and those who have filed a claim for individual relief pursuant to a class complaint. *See* 29 C.F.R. § 1614.407 ("A complainant who has filed an individual complaint, an agent who has filed a class complaint or a claimant who has filed a claim for individual relief pursuant to a class complaint is authorized . . . to file a civil action in an appropriate United States District Court."). Nothing in these regulations authorizes individuals who do not file administrative complaints or claims for individual relief to bring civil actions in federal court; it therefore follows that nothing in these regulations authorizes an individual to bring a civil action notwithstanding the exhaustion requirement set out in 42 U.S.C. § 2000e-16(c), which, as we have explained, authorizes an individual to bring a civil action only 180 days after he has filed an administrative complaint. And significantly, the EEOC itself seems to accept this view of its regulations, explaining to us:

Our regulations only recognize suit rights for class members who file individual complaints, class complaints, or individual claims for relief under a class complaint. Therefore, if class certification is denied or class discrimination is not found, those individuals who did not file individual complaints may have lost the ability to file suit. In other words, filing an individual complaint is the only way for a potential class member to ensure his or her right to sue with certainty.

EEOC Letter at 6.

It is true that under the so-called "single-filing rule," some courts have allowed an individual who did not file an administrative complaint to join the civil suit of another individual who did exhaust the administrative process, where the claims of the two individuals are sufficiently similar. But even assuming that courts would extend this rule in the manner that you suggest—such that an individual who did not file an administrative complaint but whose claim, had it been filed administratively, would have fallen within the class, could initiate a civil action in federal district court to the same extent as a class member who did file an administrative complaint<sup>8</sup>—the result would still point to no inconsistency between 42 U.S.C. § 2000e-16(c) and the EEOC's class action regulations. The single-filing rule does not rest on an interpretation of EEOC regulations; rather, it rests on an interpretation of 42 U.S.C. § 2000e-16(c) or other analogous provisions—one in which the *statutes* have been construed to permit an individual who did not exhaust his

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<sup>8</sup> *But see Commc'n Workers of Am. v. N.J. Dep't of Personnel*, 282 F.3d 213, 218 (3d Cir. 2002) ("[I]f plaintiffs choose to bring suit individually, they must first satisfy the prerequisite of filing a timely EEOC charge.") (citation and quotation omitted).

administrative remedies to piggyback upon an individual who did. *See, e.g., Snell*, 782 F.2d at 1100–02 & n.7; *Greene*, 204 F. Supp. 2d at 240. The EEOC's regulations do not expressly expand the single-filing rule in the manner you suggest, and to the extent that the courts may construe them to do so, the courts would construe them so as to be consistent with—not to *conflict* with—the statute. (Conversely, were it determined that 42 U.S.C. § 2000e-16(b) does not permit the single-filing rule to be extended in the manner that you suggest, we have little doubt that the regulations too would be similarly construed.<sup>9</sup>)

Accordingly, the possibility you have presented—that an individual would be permitted to initiate an action in federal court without ever having to file an administrative complaint—again points to no inconsistency between the statute and EEOC's regulations in implementation thereof.

### 3.

Finally, you contend that EEOC's class action regulations are inconsistent with the limitations period set forth in 42 U.S.C. § 2000e-16(c), which allows a complainant to file a civil action in federal district court only within ninety days of receipt of notice of final agency or EEOC action. As you note, this ninety-day period does not begin to run until “receipt of notice of final action” on a complaint of discrimination. 42 U.S.C. § 2000e-16(c). But, you state, under the EEOC's regulations, not all members who have a right to bring suit in federal court will receive the required notice; these class members who never receive notice, therefore, will be entitled to bring suit in federal court even after the ninety-day period. USPS Letter at 7.

Under the EEOC's regulations, however, every complainant who files an administrative claim will receive the requisite notice of final agency or EEOC action. If the class is certified, then “[t]he agency shall notify class members of the final decision and relief awarded, if any.” 29 C.F.R. § 1614.204(k). If the class is not certified, then, in addition to notifying the class agent, *id.* § 1614.204(d)(7), the agency “shall, within thirty (30) days of receipt of a decision dismissing a class complaint . . . issue the acknowledgment of receipt of an individual complaint . . . and process . . . each individual complaint that was subsumed into the class complaint,” MD 110, ch. 8, § III.C. And if the class complaint is settled, “[n]otice of the resolution shall be given to all class members . . . [including notification] that . . . any member of the class may petition the administrative judge to vacate

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<sup>9</sup> To the extent your argument is based on case law arising under Rule 23 of the Federal Rules of Civil Procedure (and hence, outside of the administrative context), *see, e.g., USPS Letter* at 6 & n.29, we believe it fails for the same reason. If such case law were extended to permit an individual who fails to satisfy the administrative exhaustion requirement nevertheless to file suit in federal court, this apparently unprecedented application of Rule 23 case law would necessarily be predicated upon an interpretation of Title VII and regulations that rendered them consistent, rather than in conflict with, one another.

the resolution.” 29 C.F.R. § 1614.204(g)(4). Every individual who files an administrative complaint, in other words, will receive notice of final agency action and thus will be fully subject to 42 U.S.C. § 2000e-16(c)’s ninety-day limitation period. *See also* EEOC Letter at 7 (“The regulation requires notice to all individuals except those potential members of a class that was not certified who did not file individual complaints.”).

That leaves only individuals who do not file an administrative complaint. But with respect to these, your arguments fail for the same reasons discussed in Part II.B.2.b, *supra*: First, the regulations on their face only authorize those individuals who have filed an administrative complaint to bring suit in federal court; these individuals, we have explained, will receive notice and thus will be subject to the ninety-day period. And second, to the extent that courts would allow individuals who have not filed administrative claims to bring suit in federal court notwithstanding 42 U.S.C. § 2000e-16(c), this result would follow from a construction of the statute itself, not a construction of the regulations that would render them inconsistent with the statute.

#### IV.

For the foregoing reasons, we conclude that the EEOC’s class action regulations are not contrary to Title VII in any of the three ways you have suggested.

NOEL J. FRANCISCO  
*Deputy Assistant Attorney General*  
*Office of Legal Counsel*

## Use of Appropriations to Pay Travel Expenses of International Trade Administration Fellows

The payment of travel expenses for International Trade Administration fellows is barred by 31 U.S.C. § 1345 because the proposed ITA fellowship program that would bring representatives from various countries to the United States would constitute a “meeting” within the meaning of section 1345.

October 7, 2004

### MEMORANDUM OPINION FOR THE DEPUTY SECRETARY DEPARTMENT OF COMMERCE

You have asked whether a proposed International Trade Administration (“ITA”) fellowship program that would bring representatives from various countries to the United States would constitute a “meeting” within the meaning of 31 U.S.C. § 1345 (2000), which prohibits the use of appropriations “for travel, transportation, and subsistence expenses for a meeting,” except as specifically provided by law. We conclude that the program would constitute a “meeting” within the meaning of section 1345.

#### I.

Located in the Department of Commerce, ITA provides information to American businesses about global markets, ensures that American businesses have access to international markets as required by trade agreements, and safeguards American businesses from unfair competition from dumped and subsidized imports. *See* Overview: About ITA, *available at* <http://ita.doc.gov/about.html> (last visited Sept. 7, 2004). In view of this mission, ITA would like to develop a management training fellowship program for representatives from several African countries. The program would

- (1) educat[e] African businessmen, and government and parastatal employees about the U.S. financial services market and the U.S. Government programs;
- (2) provid[e] an opportunity for American businesses to learn more about potential opportunities in Africa by allowing them to evaluate the risk of doing business in various African countries; and
- (3) allow[] the U.S. Government to obtain more concrete information to help it formulate its policy.

Letter for Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, from Theodore W. Kassinger, Deputy Secretary, Department of Commerce at 1 (Mar. 19, 2004). ITA would bring 12–15 representatives of African countries to the United States for two weeks. The fellows would receive a basic

orientation at the Department of Commerce, and would “meet with other Government trade agencies” and “with various private sector organizations that specialize in the area of financial services.” *Id.* “Another potential part of the program,” you have explained, “would send the fellows elsewhere in the United States to meet with the various U.S. companies that have projects of interest or with academics who specialize in financial services.” *Id.* at 1–2.

You have asked whether section 1345 would prohibit ITA from using appropriations to pay for the fellows’ transportation expenses under the program and, in particular, whether the program would constitute a “meeting” within the meaning of section 1345.

## II.

We begin, as we must, with the text of the statute. We “must presume that [Congress] says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last.” *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992).

By itself, the text of section 1345 does not naturally support the proposed expenditures. Section 1345 states:

Except as specifically provided by law, an appropriation may not be used for travel, transportation, and subsistence expenses for a meeting. This section does not prohibit—

- (1) an agency from paying the expenses of an officer or employee of the United States Government carrying out an official duty; and
- (2) the Secretary of Agriculture from paying necessary expenses for a meeting called by the Secretary for 4-H Boys and Girls Clubs as part of the cooperative extension work of the Department of Agriculture.

31 U.S.C. § 1345. We have previously explained that section 1345 “give[s] force” to the “principle . . . that appropriated funds cannot generally be used to pay the expenses of persons who are not federal employees.” Memorandum for Michael E. Shaheen, Jr., Counsel, Office of Professional Responsibility, from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Use of Department of Justice Vehicles by Attorney General’s Spouse* at 5 (Jan. 23, 1984) (“1984 Vehicles Memorandum”).

In everyday usage, the program you have described would involve a “meeting”—indeed, several meetings. See *Webster’s Third New Int’l Dictionary* 1404 (2002) (“meeting” means “an act or process of coming together”; “a gathering for business, social, or other purposes”). According to your letter, the fellows will “meet with . . . Government trade agencies,” “meet with various private sector organizations,” and potentially “meet with various U.S. companies.” As the

fellows would not fall within section 1345's general exceptions—for “officer[s] or employee[s] of the United States carrying out an official duty” and “4-H Boys and Girls Clubs”—by its terms section 1345 would require ITA to identify another law specifically providing for the expenditure in order to pay the fellows' travel expenses for the proposed meetings.

The context in which the statute uses the word “meeting” bolsters this conclusion. Section 1345 includes an exception allowing “the Secretary of Agriculture [to] pay[] necessary expenses for a meeting called by the Secretary for 4-H Boys and Girls Clubs as part of the cooperative extension work of the Department of Agriculture.” 31 U.S.C. § 1345(2). *See* Pub. Res. No. 74-32, 49 Stat. 387 (1935) (adding this exception to section 1345 during the same session of Congress in which section 1345 was first enacted). Not unlike ITA's mission with respect to America's prospective trading partners in Africa, the “cooperative extension work” of the Department of Agriculture requires it to work with state agricultural colleges to “giv[e] instruction and practical demonstrations . . . in agriculture . . . [and] home economics” to America's future farmers and homemakers. 7 U.S.C. § 342 (2000); *see* Smith-Lever Act, ch. 79, § 2, 38 Stat. 372 (1914); Capper-Ketcham Act, ch. 687, § 1, 45 Stat. 711 (1928). If 4-H “meeting[s]” called by the Secretary of Agriculture in furtherance of his cooperative extension work would, but for this exception, be “meeting[s]” prohibited by section 1345, as the existence and language of the 4-H exception implies, ITA meetings called by the Secretary of Commerce to give instruction in American financial services markets to our future trading partners in Africa also constitute “meeting[s]” to which section 1345 applies.

Comptroller General opinions interpreting section 1345 under analogous circumstances reinforce this analysis.<sup>1</sup> Shortly after Congress first enacted section 1345 in 1935, the Comptroller General issued an opinion concluding that the plain language of the statute prohibited the government from paying the travel and lodging expenses of private citizens who were assisting the Federal Housing Administration in a campaign to encourage the repair and modernization of real estate. *See Federal Housing Administration—Conventions and Gatherings—Statutory Construction*, 14 Comp. Gen. 638 (1935). A few months later, the Comptroller General concluded that section 1345 prohibited the American Battle Monuments Commission from providing private citizens with transportation to monument dedication ceremonies in *Europe. Conventions and Gatherings—Lodging, Feeding, and Transporting*, 14 Comp. Gen. 851 (1935). And more recently, the Comptroller General has concluded that section 1345 prohibits the Mine Safety and Health Administration from paying the travel expenses of miners

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<sup>1</sup> Although “the Comptroller General, as the agent of Congress, cannot issue interpretations of the law that are binding on the executive branch,” *Comptroller General's Authority to Relieve Disbursing and Certifying Officials from Liability*, 15 Op. O.L.C. 80, 82 (1991), his interpretations “may be considered for whatever persuasive value they may offer,” *Submission of Aviation Insurance Program Claims to Binding Arbitration*, 20 Op. O.L.C. 341, 343 n.3 (1996).

and mine operators to attend mine safety training conducted by the Mine Safety and Health Administration. *Mine Safety and Health Administration—Payment of Travel Expenses at Seminars*, B-193644, 1979 WL 12354 (Comp. Gen. July 2, 1979). See also *National Highway Traffic Safety Administration—Travel and Lodging Expenses*, 62 Comp. Gen. 531 (1983) (section 1345 prohibits the National Highway Traffic Safety Administration from paying travel expenses for state officials to attend a workshop on odometer fraud); *Travel Expenses—Convention, Conferences, etc.—Attendees—State Officials*, 55 Comp. Gen. 750 (1976) (section 1345 prohibits the Environmental Protection Agency from paying the travel expense of state officials to attend solid waste conference jointly sponsored by the EPA).

All of these sources point to the same conclusion—meetings, as proposed here, between a dozen or more individuals and the representatives of various governmental and private entities qualify as “meeting[s]” within the meaning of section 1345.

You have argued, nevertheless, that one must interpret the word “meeting” in the light of the language and purpose of the original version of section 1345, because Congress did not insert the word “meeting” in the statute until 1982, when it recodified title 31. The joint resolution now codified at section 1345 was originally passed by Congress and signed by the President in 1935. Pub. Res. No. 74-2, 49 Stat. 19 (1935). According to the findings preceding the resolution, “numerous applications [were] being received from various organizations requesting lodging, food, and transportation for the purpose of holding conventions or meetings at Washington and elsewhere,” and “the expenditure of Government funds for such purposes is against the policy of Congress.” *Id.* To that end, the original joint resolution provided that

unless specifically provided by law, no moneys from funds appropriated for any purpose shall be used for the purpose of lodging, feeding, conveying, or furnishing transportation to, any conventions or other form of assemblage or gathering to be held in the District of Columbia or elsewhere. This section shall not be construed to prohibit the payment of expenses of any officer or employee of the Government in the discharge of his official duties.

*Id.* (emphasis added). In 1982, Congress substituted the term “a meeting” for “any conventions or other form of assemblage or gathering,” Pub. L. No. 97-258, sec. 1, § 1345, 96 Stat. 877, 925 (1982), but stated that the change “may not be construed as making a substantive change in the law[] replaced,” *id.* § 4(a), 96 Stat. at 1067.

Even if the word “meeting” means “any conventions or other form of assemblage or gathering,” it is difficult to see how the meetings proposed under the ITA program would not constitute a “form of assemblage or gathering.” While the word “convention” in isolation may have a more limited connotation, the full phrase “any convention or other form of assemblage or gathering”—giving the

words their ordinary meaning—sweeps broadly enough to include the meetings proposed here.<sup>2</sup> The Comptroller General’s 1935 opinions noted above, decided under the original language, are consistent with this conclusion, as is his 1979 opinion regarding mine safety training, and others. We need not decide that every encounter involving two or more people would constitute a “convention[] or other form of assemblage or gathering” to conclude that the ITA’s proposed meetings, which would involve larger representative groups, would fall within the plain terms of the original resolution.

You also suggest that a 1993 decision by the Comptroller General supports the argument that the proposed ITA program does not involve a “meeting” for purposes of section 1345. In that opinion, the Comptroller General concluded that section 1345 did not prohibit the Department of Defense (“DOD”) from paying the travel expenses of private recruiters to attend an overseas job fair for government teachers who were being laid off by DOD. The Comptroller General concluded that job fairs and one-on-one interviews with teachers were not “the type of ‘meeting’ the statute was intended to reach.” *Use of Appropriated Funds to Pay for Recruiters to Attend Department of Defense Dependent Schools Job Fairs*, 72 Comp. Gen. 229, 230–31 (1993). Relying on the statute’s legislative history, the Comptroller General explained that “the principal focus of section 1345 . . . was on conventions or other forms of assemblages or gatherings that various private organizations were seeking to hold at government expense.” *Id.* at 231. The DOD job fair was different. “Provided DOD determines that the contemplated payments are necessary to accomplish the purpose of the appropriation to be charged,” the Comptroller General concluded, section 1345 permits DOD to pay the travel expenses of private parties who would “provide a direct benefit to the government.” *Id.*

In our view, the 1993 Comptroller General opinion does not support the expenditures proposed here. Unlike the group encounter involved in the proposed ITA program and the group encounters involved in earlier Comptroller General opinions, the DOD job fair involved individual encounters. The ultimate goal was for individual recruiters to interview and hire individual teachers. An opinion concluding that a series of one-on-one encounters is not a “meeting” does not

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<sup>2</sup> See *Funk & Wagnall’s New Standard Dictionary of the English Language* 572 (1946) (“convention” is “[a] formal or stated gathering of persons for some specific purpose; especially a meeting for discussion or concerted action of delegates or representatives”); *id.* at 170 (“assemblage” is “[t]he act of assembling, or the state of being assembled; association” or “[a] collection of persons or things assembled or associated”); *id.* at 1013 (“gathering” is “[t]hat which is gathered or brought together”); *Webster’s New Int’l Dictionary of the English Language* 582 (2d ed. 1944) (“convention” is “[a] coming together or meeting” or “[a] body or assembly of persons met for some common purpose; esp., a formal and special or occasional assembly of delegates, representatives, members of an estate or party, or the like, met to accomplish some specific civil, social, political, ecclesiastical, or other important object”); *id.* at 165 (“assemblage” is the “[a]ct of assembling; state of being assembled” or “[a] collection of individuals, or of particular things; an aggregation; as, a political assemblage”); *id.* at 1038 (“gathering” is “[s]omething gathered; as . . . [a] crowd; assembly; congregation”).

advance the argument that a series of group encounters does not constitute a meeting.

More importantly, however, the Comptroller General's reasoning in that opinion rests on a questionable and discredited premise—that the floor statements of a few members of Congress can alter the unambiguous text of a statute voted upon by the whole Congress. See *HUD v. Rucker*, 535 U.S. 125, 132 (2002) (“reference to legislative history is inappropriate when the text of the statute is unambiguous”). Statements in section 1345's legislative history variously suggest that the purpose of the law was to withhold travel expenses from “national organizations,” 79 Cong. Rec. 709 (1935), “organizations of any kind,” *id.* at 710, groups that travel to Washington “for the purpose of presenting propaganda for their pet projects before committees of Congress or departments of the Government,” *id.*, and “communistic veteran organizations,” *id.* at 711. But the statute's text is not so limited, and we may not stray from that unambiguous text on the basis of statements made by individual members of Congress.

The very brief debate on the original measure in the Senate illustrates the danger. As you observe in your letter, Senator Byrnes explained that section 1345's purpose was to prevent government funding of “conventions.” *Id.* at 1109 (section 1345 “is simply a declaration of policy of the Congress that no funds of any lump-sum appropriation should be used to pay the expenses of delegates to any convention in the District of Columbia”). In the next breath, when asked whether the law “relates to the District of Columbia alone,” Senator Byrnes asserted his belief that it, indeed, related to the District of Columbia alone. *Id.* That, however, is not what the text of the law says. We cannot rely on a single senator's comments to show that the law applies to conventions alone—when the law as originally framed referred to “conventions and other forms of assemblage or gathering” (and, later, “meetings”)—any more than we can conclude that the law only applies to meetings held in the District of Columbia—when the law referred to the “District of Columbia or elsewhere.” The best indicator of statutory meaning is the statutory text, which in this case broadly prohibits using general appropriations to pay the travel expenses of a private person for a meeting. See *Conventions and Gatherings*, 14 Comp. Gen. at 640 (rejecting reliance on section 1345's legislative history because “[t]here seems very little if any room for doubt as to the reasonable meaning and legal effect of [the statute's] language”).<sup>3</sup>

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<sup>3</sup> The 1993 Comptroller General opinion discussed in your letter may reach the correct conclusion, but for the wrong reason. The better view is that the job fair does constitute a “meeting,” “assemblage,” or “gathering.” Were an agency to pay the travel expenses of private recruiters to attend a private job fair, no one could doubt that it would contravene the plain language and purpose of section 1345. It would, in short, constitute a meeting. What distinguishes the DOD job fair, as the Comptroller General opinion suggests, was that “the recruiters provide[d] a direct benefit to the government,” by hiring teachers and saving the government the cost of laying them off (early retirement incentives and general administrative costs). This “direct benefit” to the Government may have qualified the recruiters to receive travel expenses under a limited but well-recognized exception to section 1345—the “invitation-al travel” statute, 5 U.S.C. § 5703 (2000), which allows the government to pay the travel expenses of certain individuals who provide a direct service to the government.

Also unavailing are the other grounds cited in your letter for distinguishing the proposed ITA program from a “meeting.” That the program does not involve an application from an outside organization, does not involve a general conference of interest to a broad spectrum of people, and is not open to anyone who pays a registration fee does not change the result. By its terms, the statute is not limited to meetings for which outside organizations request funds, in which a broad spectrum of people show interest, or that are open to any person who wishes to register. Moreover, while the program is clearly an important one, section 1345 does not contain an exception based on the importance of the program. To the contrary, in broad terms that leave little room for interpretation, the statute directs federal entities not to pay a private party’s travel expenses for a meeting, “[e]xcept as specifically provided by law.” 31 U.S.C. § 1345.

### III.

Because the proposed ITA program would qualify as a “meeting” within the meaning of section 1345, ITA may not pay the attendees’ travel expenses unless Congress has “specifically provided by law” for the payment of private individuals’ travel expenses to such a meeting. You have not identified any statute that would provide such authority.<sup>4</sup>

STEVEN G. BRADBURY

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<sup>4</sup> As general authority for the program, your letter cites 22 U.S.C. § 2351(b) (2000), which authorizes the President to “make arrangements to find, and draw the attention of private enterprise to, opportunities for investment and development in less-developed friendly countries and areas.” You do not contend, however, that section 2351 speaks with sufficient specificity to satisfy section 1345. One statutory authority that may have possible relevance is 5 U.S.C. § 5703, the “invitational travel” statute, which provides that

[an] employee serving intermittently in the Government service as an expert or consultant and paid on a daily when-actually-employed basis, or serving without pay or at \$1 a year, may be allowed travel or transportation expenses . . . while away from his home or regular place of business and at the place of employment or service.

As specifically used in section 5703, the term “employee” means “an individual employed in or under an agency including an individual employed intermittently in the Government service as an expert or consultant . . . and an individual serving without pay.” *Id.* § 5701(2) (emphasis added). The law views such individuals “as temporary employees or ‘quasi employees’ during the period of their service to the government.” 1984 Vehicles Memorandum at 6. This authority is strictly limited to circumstances where the individual is “legitimately performing a direct service for the Government.” *Id.* at 7 (emphasis added; internal quotation marks omitted); see 1 General Accounting Office, *Principles of Federal Appropriations Law* at 4-47 to 4-50 (3d ed. 2004). We are not in a position to judge whether any benefits to ITA from the fellowship program might satisfy the requirements of section 5703 for the payment of some or all of the fellows’ travel expenses. That is a determination best made by your Department’s fiscal officers, based on all of the facts and circumstances of the proposed program.

## Applicability of Section 504 of the Rehabilitation Act to Tribally Controlled Schools

Section 504 of the Rehabilitation Act generally applies to tribally controlled schools that receive federal financial assistance from the Department of Justice.

November 16, 2004

### MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL OFFICE OF JUSTICE PROGRAMS

You have asked us whether section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (2000), generally applies to tribally controlled schools that receive federal financial assistance from the Department of Justice. We conclude that it does.<sup>1</sup>

#### I.

We begin our analysis with an overview of the relevant interpretive principles. The Supreme Court “ha[s] stated time and again” that we “must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (citations omitted). When addressing the effects of statutes governing Indian tribes, however, the Court has articulated two additional canons of construction. First, in what is really a variation of the plain meaning rule, the Court has said that “it is now well settled by many decisions of th[e] [Supreme] Court

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<sup>1</sup> The original opinion request, sent to us by your predecessor, framed the question as “whether the doctrine of tribal sovereign immunity” would prevent the Office of Justice Programs from investigating an allegation of discrimination by a tribal school. See Memorandum for Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, from Mary Lou Leary, Acting Assistant Attorney General, Office of Justice Programs, *Re: Request for Office of Legal Counsel Review* (Nov. 29, 2000). The doctrine of tribal sovereign immunity, however, is inapplicable to investigations brought by the federal Government. See, e.g., *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 382–83 (8th Cir. 1987); *Fla. Paraplegic Ass’n v. Miccosukee Tribe*, 166 F.3d 1126, 1134–35 (11th Cir. 1999); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459–60 (9th Cir. 1994). We therefore address whether section 504 of the Rehabilitation Act generally applies to tribally controlled schools. We have also solicited the views of other components of the Department of Justice and agencies that would be affected by this opinion. See Memorandum for Daniel L. Koffsky, Acting Assistant Attorney General, Office of Legal Counsel, from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, *Re: Applicability of Certain Civil Rights Statutes to Indian Tribes and Tribally-Operated Entities* (Aug. 21, 2001); Memorandum for Leslie Simon, Attorney-Adviser, Office of Legal Counsel, from Timothy W. Joranko, Deputy Director, Office of Tribal Justice, *Re: Applicability of Civil Rights Statutes to Indian Tribes and Tribally-Operated Entities* (Sept. 20, 2001); Letter for Daniel L. Koffsky, Acting Assistant Attorney General, Office of Legal Counsel, from Steve Winnick, Deputy General Counsel, Dep’t of Education (Aug. 17, 2001). (The Department of the Interior and the Environmental Protection Agency did not provide formal views in response to our request.)

that a general statute in terms applying to all persons includes Indians and their property interests.” *Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960). Thus, it is an established “rule[] . . . that general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary.” *Id.* at 120. See also *Superintendent of Five Civilized Tribes v. Comm’r of Internal Revenue*, 295 U.S. 418, 420 (1935) (upholding application of federal income tax to Indians where “[t]he terms of the . . . Act are very broad, and nothing there indicates that Indians are to be excepted”). Second, the Supreme Court has also recognized “a principle deeply rooted in this Court’s Indian jurisprudence: ‘[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.’” *Cnty. of Yakima v. Confederated Tribes*, 502 U.S. 251, 268–69 (1992) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)).

At first blush, one might think these two canons to be in tension: On the one hand, general statutes apply to Indians unless they are expressly excluded, while on the other, any statutory ambiguities should be construed to the benefit of Indians. In fact, however, they are easily reconciled. A generally worded statute the plain terms of which naturally encompass Indian tribes or tribal entities is not ambiguous, and a statute that is ambiguous as to whether it encompasses Indian tribes is not a generally worded statute the plain terms of which naturally encompass Indian tribes. See *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506 (1986) (“The canon of construction regarding the resolution of ambiguities in favor of Indians . . . does not permit reliance on ambiguities that do not exist . . .”); *Chickasaw Nation v. United States*, 534 U.S. 84, 88–89 (2001) (declining to find ambiguity despite poor drafting of statute). In other words, a broad statute the terms of which naturally encompass Indian tribes is unambiguously broad, and so unambiguously encompasses Indian tribes. In such a case, the ambiguity-resolving canon is simply inapplicable.

The cases setting forth these two canons are illustrative. Those applying the former rule—*viz.*, that general statutes apply to Indian tribes unless specifically excepted—involve broad but unambiguous statutory language. *Tuscarora*, for example, held that tribally owned lands were subject to the eminent domain powers of the Federal Power Act, which authorized the condemnation of “the lands or property of others necessary to the construction, maintenance, or operation” of licensed development projects. *Tuscarora*, 362 U.S. at 115 (quoting section 21 of the Federal Power Act) (emphasis added). As the Court explained, “[t]hat section does not exclude lands or property owned by Indians, and, upon the authority of the cases cited, we must hold that it applies to these lands owned in fee simple by the Tuscarora Indian Nation.” *Id.* at 118. Likewise, *Choteau v. Burnet*, 283 U.S. 691 (1931), held that the Revenue Act, which “subjects the income of ‘every individual’ to tax” and “includes income ‘from any source whatever,’” *id.* at 693, 694 (quoting the Revenue Act) (emphases added), applied to the income of an Indian derived from his shares in the oil and gas leases of an

Indian tribe, observing that “[t]he intent to exclude must be definitely expressed, where, as here, the general language of the Act laying the tax is broad enough to include the subject-matter,” *id.* at 697. *See also Superintendent of Five Civilized Tribes*, 295 U.S. at 419–20 (holding that an Indian’s income derived from tribal lands was subject to the Revenue Act) (citing *Choteau*); *Henkel v. United States*, 237 U.S. 43, 49 (1915) (holding that Secretary of the Interior could purchase or condemn Indian-owned land pursuant to the Reclamation Act of 1902, which authorized him “‘to acquire [by purchase or condemnation] any rights or property’” necessary to carry out the provisions of the Act and “‘to perform any and all acts . . . necessary and proper for the purpose of carrying the provisions of this act . . . into effect’”) (quoting Reclamation Act of 1902) (emphases added); *Okla. Tax Comm’n v. United States*, 319 U.S. 598, 600, 607 (1943) (holding that the estate of an Oklahoma Indian was subject to state inheritance and estate taxes; noting that “[t]he language of the statutes does not except either Indians or any other persons from their scope” and that “[i]f Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words”).

In contrast, the Supreme Court’s cases applying the latter ambiguity-resolving canon did not involve broad statutes of general application, but rather, statutes or treaties that the Court actually regarded as ambiguous as to their application to particular Indians. In *Yakima*, for example, the Court concluded that a statute that authorized a state to subject certain Indian-owned land to state “‘taxation of . . . land,’” 502 U.S. at 258 n.1 (quoting 25 U.S.C. § 349), did not authorize the state to subject such land to an “excise tax on sales of fee land,” *id.* at 268 (emphasis added). Justice Scalia, writing for the Court, explained:

[T]he General Allotment Act explicitly authorizes only “taxation of . . . land,” not “taxation with respect to land,” “taxation of transactions involving land,” or “taxation based on the value of land.” Because it is eminently reasonable to interpret that language as not including a tax upon the sale of real estate, our cases require us to apply that interpretation for the benefit of the Tribe.

*Id.* at 269. Likewise, in *Bryan v. Itasca County*, 426 U.S. 373 (1976), the Court held that the statute that gave the “‘civil laws of such State . . . that are of general application . . . the same force and effect within such Indian country as they have elsewhere,’” *id.* at 377 (quoting 28 U.S.C. § 1360(a)), did not allow a state to impose its tax laws on reservation Indians. Read in the context of a statute that was intended “to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes,” the Court concluded that the emphasized phrase merely “authorize[d] application by the state courts of their rules of decision to decide such disputes.” *Id.* at 383–84. And in

*Montana v. Blackfeet Tribe*, 471 U.S. 759, 767–68 (1985), the Court held that a 1938 statute that repealed “[a]ll . . . or parts of Acts inconsistent herewith,” *id.* at 764 (quoting the 1938 Act), did not leave intact a 1924 statute authorizing states to tax the income from Indian oil and gas leases: the 1938 Act’s repealer clause, the Court explained, “[could not] be taken to incorporate consistent provisions of earlier laws,” *id.* at 767. *See also id.* at 767–68 (“The tax proviso in the 1924 Act states that ‘the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located . . . .’ Even applying ordinary principles of statutory construction, ‘such lands’ refers to ‘[u]nallotted land . . . subject to lease for mining purposes . . . under section 397 [the 1891 Act].’ When the statute is ‘liberally construed . . . in favor of the Indians,’ it is clear that if the tax proviso survives at all, it reaches only those leases executed under the 1891 Act and its 1924 amendment.”) (citations omitted). In the same vein, the Court has refused to resort to the ambiguity-resolving canon in the face of unambiguous statutory language. *See, e.g., Negonsott v. Samuels*, 507 U.S. 99, 110 (1993) (declining to apply ambiguity-resolving canon where a federal statute “quite unambiguously confers jurisdiction on the State” to prosecute Indians for violations of state criminal law).

This point, that ambiguity-resolving canons do not overcome unambiguously broad statutory text, is further illustrated in a Supreme Court case discussing a similar—though even more restrictive—canon of construction: that “absent an ‘unmistakably clear’ expression of intent to ‘alter the usual constitutional balance between the States and the Federal Government,’ we will interpret a statute to preserve rather than destroy the States’ ‘substantial sovereign powers.’” *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 208–09 (1998). In *Yeskey*, the Court addressed the applicability of the Americans with Disabilities Act (“ADA”) to state prisons, concluding that even though state prisons were nowhere specifically mentioned in the ADA, the statute’s broad terms were unambiguous. The Court found that the broadly defined term “public entity,” which included “‘any department, agency, special purpose district, or other instrumentality of a State or States or local government,’” *id.* at 210 (quoting 42 U.S.C. § 12131(B)), “plainly covers state institutions *without* any exception that could cast the coverage of prisons into doubt.” *Id.* at 209. It likewise rejected the contention that prisons do not provide to prisoners the “benefits of the services, programs, or activities of a public entity,” *id.* at 210 (quoting 42 U.S.C. § 12132): “Modern prisons,” the Court explained, “provide inmates with many recreational ‘activities,’ medical ‘services,’ and educational and vocational ‘programs,’ all of which at least theoretically ‘benefit’ the prisoners (and any of which disabled prisoners could be ‘excluded from participation in’).” *Id.* *See also id.* at 210–11 (rejecting argument that the term “qualified individual with a disability” was ambiguous as applied to prisoners).

In short, ambiguity-resolving canons do not overcome a broad but otherwise unambiguous statutory command. To the contrary, a broad, generally worded

statute the plain terms of which naturally encompass Indians should normally be deemed to so apply unless Indians are expressly excluded from its application.

## II.

With these general principles in mind, we now turn to applying them to section 504 of the Rehabilitation Act. Section 504 provides:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any *program or activity* receiving Federal financial assistance or under any *program or activity* conducted by any Executive agency.

29 U.S.C. § 794(a) (emphases added). The question we must resolve is whether a federally funded, tribally controlled school is a “program or activity” within the meaning of this statute.

Applying standard canons of statutory construction, we believe that a “program or activity” under section 504 unambiguously encompasses tribally controlled schools. Section 504 defines a “program or activity” to include, among other things, “all of the operations of” (1) “a local educational agency (as defined in section 7801 of Title 20), system of vocational education, or *other school system*,” 29 U.S.C. § 794(b)(2)(B) (emphasis added); and (2) a “college, university, or other postsecondary institution.” *Id.* § 794(b)(2)(A).<sup>2</sup> These terms—“other school system,” “other postsecondary institution”—are broadly phrased and admit of no

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<sup>2</sup> The full definition of a “program or activity” is as follows:

For the purposes of this section, the term ‘program or activity’ means all of the operations of—(1) (A) a department, agency, special purpose district, or other instrumentality of a State or local government; or (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government; (2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or (B) a local educational agency (as defined in section 7801 of Title 20), system of vocational education, or other school system; (3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or (ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or (B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or (4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance.

29 U.S.C. § 794(b).

exception for such entities merely because they are controlled by Indian tribes. Congress, in fact, has used the precise phrase “school system” in other statutes to refer to schools that receive funding from the Bureau of Indian Affairs (“BIA”), including those that are tribally controlled, thus confirming that such schools are covered under the Rehabilitation Act. *See, e.g.*, 20 U.S.C.A. § 6316(g)(4) (West 2003) (corrective action must “take into account the unique circumstances and structure of the Bureau of Indian Affairs-funded *school system*”); 25 U.S.C.A. § 2000 (West Supp. 2003) (acknowledging federal Government responsibility for the “Bureau of Indian Affairs funded *school system*”).

We do not mean to say that *every* tribally controlled school would automatically fall within these terms. To be sure, we would expect that most tribally controlled primary and secondary schools would be part of a “system of vocational education” or “other school system,” and a tribally controlled school of higher education would quite obviously be a “college, university, or other postsecondary institution.” But we at least acknowledge the theoretical possibility that some individual primary or secondary schools might not be considered part of an overall “school system.” 29 U.S.C. § 794(b)(2)(B) (emphasis added). While such a school might nevertheless fall within another category of “program[s] or activit[ies]”—a term that includes “an entire corporation, partnership, or other private organization, or an entire sole proprietorship . . . which is principally engaged in the business of providing education,” *id.* § 794(b)(3)(A)(ii)—and thus still be covered by section 504, it would be imprudent for us to draw such a conclusion as a general matter outside the context of a specific case. For now, it is enough to say that the general definition of a “program or activity” extends to tribally controlled schools, provided that such schools meet the other specific requirements of that definition.

Our conclusion that under standard principles of construction section 504 of the Rehabilitation Act covers tribally controlled schools is confirmed by the numerous other statutes that reflect this precise understanding. “[S]ubsequent legislation declaring the intent of an earlier statute,” the Supreme Court has explained, “is entitled to great weight in statutory construction.” *Loving v. United States*, 517 U.S. 748, 770 (1996) (citations omitted).<sup>3</sup> And here, Congress has consistently expressed in statutes its understanding of the scope of section 504. The Education Amendments of 1978, for example, directed the Secretary of the Interior to “immediately begin to bring all schools, dormitories, and other facilities operated by the Bureau [of Indian Affairs] or under contract with the Bureau in connection

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<sup>3</sup> Although subsequent legislation is entitled to great weight in statutory interpretation, the same is not true of the legislative history that accompanies the subsequent legislation. “With respect to subsequent legislation, . . . Congress has proceeded formally through the legislative process. A mere statement in a conference report of such legislation as to what the Committee believes an earlier statute meant is obviously less weighty.” *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980).

with the education of Indian children into compliance with . . . section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794).” Pub. L. No. 95-561, § 1125, 92 Stat. 2143, 2319 (1978). Congress recently reiterated this position in the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002), which requires that “[t]he Secretary shall immediately begin to bring all schools, dormitories, and other Indian education-related facilities operated by the Bureau or under contract or grant with the Bureau, into compliance with . . . section 794 of Title 29 [section 504]; and . . . the Americans with Disabilities Act of 1990.” 25 U.S.C.A. § 2005(b)(1) (West Supp. 2003). *Cf.* 25 U.S.C.A. § 4131(b)(6) (West Supp. 2003) (providing explicit exemption from the broad anti-discrimination requirements of Title VI for “actions by federally recognized tribes and the tribally designated housing entities of those tribes” under the Native American Housing Assistance and Self-Determination Act of 1996). These provisions serve to confirm what the plain text of section 504 otherwise dictates: that tribally controlled schools are covered by its requirements.

Before moving on, we pause to address a possible counter-argument. The definition of the term “local educational agency” that is incorporated in 29 U.S.C. § 794(b)(2)(B)’s definition of “program or activity” specifically includes certain tribally controlled schools, but only for a limited purpose. In particular, the Elementary and Secondary Education Act defines “[l]ocal educational agency” as including:

an elementary school or secondary school funded by the Bureau of Indian Affairs *but only to the extent that* including the school makes the school eligible for programs for which specific eligibility is not provided to the school in another provision of law and the school does not have a student population that is smaller than the student population of the local educational agency receiving assistance under this chapter with the smallest student population, except that the school shall not be subject to the jurisdiction of any State educational agency other than the Bureau of Indian Affairs.

20 U.S.C.A. § 7801(26)(C) (West 2003) (emphasis added). It could be argued that because at least some tribally controlled schools—*viz.*, “elementary school[s] or secondary school[s] funded by the Bureau of Indian Affairs,” *id.*—are “local educational agenc[ies],” Congress did *not* intend them also to be included as an “other school system,” else inclusion in the former would be superfluous. *See United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (“It is our duty ‘to give effect, if possible, to every clause and word of a statute.’”) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)). The syllogism, in other words, would run as follows: (1) a tribally controlled school is a “program or activity” only to the extent that it is a “local educational agency”; (2) a tribally controlled school is a “local educational agency” “*only to the extent that* including the school” in the

definition of a “local educational agency” renders it eligible to receive certain funds for which it would otherwise be ineligible; and (3) therefore, a tribally controlled school is *not* a “local educational agency,” and hence, *not* a “program or activity,” for any other purpose, including section 504’s substantive anti-discrimination provisions.

We find this argument highly strained and implausible. The inclusion of BIA-funded schools generally within the term “other school system” in section 504 does not render superfluous the inclusion of some BIA-funded schools in the generally applicable definition of “local educational agency.” Their inclusion in that latter definition serves a specific function: It gives BIA-funded schools access to non-BIA funds for which only local educational agencies are eligible and for which, absent this definition, BIA-funded schools would be ineligible. *See, e.g.*, 20 U.S.C.A. § 1413 (2000 & West Supp. 2003) (local educational agencies eligible for assistance for educating children with disabilities); 20 U.S.C.A. § 6302 (West 2003) (authorization of grants to local educational agencies). At the same time, this definition prevents BIA-funded schools from double-dipping into funds for which *both* local educational agencies *and* BIA-funded schools are eligible. *See, e.g.*, 20 U.S.C.A. § 7269(a) (West 2003) (authorizing grants, contracts, and cooperative agreements with “State educational agencies, local educational agencies, or Indian tribes, for the purpose of increasing student access to quality mental health care”); 20 U.S.C.A. § 7253c(a)(1) (West 2003) (authorizing grants and contracts with “State educational agencies, local educational agencies, institutions of higher education, other public agencies, and other private agencies and organizations (including Indian tribes and Indian organizations . . .) to assist . . . in carrying out programs or projects . . . designed to meet the educational needs of gifted and talented students”). In contrast, inclusion of tribally controlled schools in the “other school system” prong of the Rehabilitation Act’s definition of “program or activity” serves the entirely separate purpose of rendering these schools subject to that Act’s substantive requirements.<sup>4</sup> Each provision, in other

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<sup>4</sup> We note that the statutory and legislative history of this provision is consistent with our conclusion. The Rehabilitation Act’s definition of “program or activity” has long included “local educational agencies” as defined in the Elementary and Secondary School Act. Prior to 1994, however, the definition of “local educational agency” (“LEA”) in the Elementary and Secondary School Act made no mention of Indian tribes or BIA-funded schools. The Improving America’s Schools Act of 1994 (“IASA”) amended this definition to extend to BIA-funded schools for the sole purpose of allowing such schools to receive federal funds for which they would otherwise not be eligible. *See* Pub. L. No. 103-382, § 101, 103 Stat. 3518, 3889 (1994); 20 U.S.C. § 8801(18)(C) (1994); *see also* 140 Cong. Rec. 27,842, 27,848 (1994) (remarks of Sen. Kennedy) (“Under current law, Bureau schools are not covered by the definition of LEA, so, except for a few programs in which they have been specifically included, these schools could not benefit from the wide range of Federal grants and services available to public schools through the eligibility of their LEA’s. . . . The first provision defines virtually all Bureau funded schools as LEA’s, except in those cases where a specific statute already makes provision for their eligibility, as in Chapter 1 and Even Start. This exception ensures that there is no double benefit for Bureau schools.”).

words, serves a separate and independent function, and neither provision renders the other superfluous.

Accordingly, we conclude that under standard canons of statutory construction, section 504 of the Rehabilitation Act would encompass tribally controlled schools.<sup>5</sup>

### III.

The conclusions above have rested on the application of the standard principles of construction described in Part I, *supra*. Several courts of appeals, however, have applied yet another canon of construction. These courts have found an exception to the *Tuscarora* rule for a statute that “touches ‘exclusive rights of self-governance in purely intramural matters,’” unless the law specifically references Indian tribes. *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985) (citation omitted).<sup>6</sup> In such a case, these courts have explained, the *Tuscarora* rule is inapplicable, and instead, the generally worded statute is deemed *not* to apply to Indian tribes unless it explicitly states to the contrary.<sup>7</sup> As described in Part III.A,

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<sup>5</sup> Nor are tribally controlled schools exempt from the Rehabilitation Act under the Tribally Controlled Schools Act of 1988 (“TCSA”), 25 U.S.C.A. §§ 2501–2511 (2001 & West Supp. 2004). The TCSA provides, in relevant part, that “[f]unds allocated to a tribally controlled school . . . shall be subject to the provisions of this chapter and shall not be subject to any additional restriction, priority, or limitation that is imposed by the Bureau [of Indian Affairs] with respect to funds provided under—(i) title I of the Elementary and Secondary Education Act of 1965; (ii) the Individuals with Disabilities Education Act; or (iii) any Federal education law other than title XI of the Education Amendments of 1978,” and that “Indian tribes and tribal organizations to which grants are provided under this part, and tribally controlled schools for which such grants are provided, shall not be subject to any requirements, obligations, restrictions, or limitations imposed by the Bureau that would otherwise apply solely by reason of the receipt of funds provided under any law referred to in clause (i), (ii), or (iii).” 25 U.S.C. § 2503(b)(1) (emphasis added). According to the Departments of Education and the Interior, this provision simply means “that the BIA cannot impose additional requirements under Title I, IDEA and other federal education laws beyond what is required in the federal law.” Letter for Noel J. Francisco, Deputy Assistant Attorney General, Office of Legal Counsel, from Brian W. Jones, General Counsel, Dep’t of Education at 2 (July 15, 2004); *see also* Letter for Noel J. Francisco, Deputy Assistant Attorney General, Office of Legal Counsel, from Christopher B. Chaney, Associate Solicitor, Dep’t of the Interior (Sept. 14, 2004) (agreeing with the Department of Education on this point). In addition, the Rehabilitation Act is not a “Federal education law,” any more so than would be a law that generally prohibits robbery, including robberies that take place on school grounds. It is, rather, a general antidiscrimination law that applies to a broad range of institutions, including schools, and to all federal financial assistance programs, not just those administered by the BIA under federal education laws.

<sup>6</sup> *See, e.g., Fla. Paraplegic Ass’n*, 166 F.3d at 1129; *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 935 & n.5 (7th Cir. 1989); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 175, 179 (2d Cir. 1996); *Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457, 1462–63 (10th Cir. 1989); *EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 249 (8th Cir. 1993).

<sup>7</sup> These courts have also recognized two other “exceptions” to the *Tuscarora* rule: (1) where “the application of the law to the tribe would ‘abrogate rights guaranteed by Indian treaties’”; and (2) where “there is proof ‘by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations.’” *Coeur d’Alene Tribal Farm*, 751 F. 2d at 1116. We do not address these applications of the rule except to note that they have a stronger basis than the one discussed in

*infra*, the basis for this exception is unclear. In any event, for the reasons described in part III.B, *infra*, we conclude that this canon is inapplicable to the question whether section 504 of the Rehabilitation Act extends to tribally controlled schools.

### A.

The Supreme Court has never explicitly adopted an exception to the *Tuscarora* rule for generally applicable statutes that “touch[] ‘exclusive rights of self-governance in purely intramural matters.’” The “self-governance” exception appears to have originated in the Ninth Circuit’s decision in *United States v. Farris*, 624 F.2d 890, 893 (9th Cir. 1980).<sup>8</sup> It has since been recognized by a number of courts of appeals, *see supra* note 6, though significantly, we are aware of only a few instances in which the self-governance exception has actually been applied to narrow an otherwise applicable generally worded statute.<sup>9</sup> It is unclear, however, whether this exception is consistent with Supreme Court precedent.

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text. The first involves a conflict between two laws—an Indian treaty and a broadly worded statute; the choice to give one preference over the other is therefore unavoidable. *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202–03 (1999) (“Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so.”). And the second exception involves nothing more than determining the statute’s meaning by reference to its legislative history, which is different from limiting the otherwise plain reach of a statute’s broad commands. Neither of these applications is here at issue, because we face no treaty with which section 504 of the Rehabilitation Act would conflict, nor any legislative history that would limit section 504’s otherwise broad reach.

<sup>8</sup> In *Farris*, the court suggested that “reservation Indians may well have exclusive rights of self-governance in purely intramural matters, unless Congress has removed those rights through legislation explicitly directed at Indians.” 624 F.2d at 893. As examples of such “purely intramural matters,” the court subsequently listed “conditions of tribal membership, inheritance rules, and domestic relations.” *Coeur d’Alene Tribal Farm*, 751 F.2d at 1116. As discussed below, *see infra* Part. III.B, the Supreme Court has recognized tribal authority to regulate these three areas in the absence of federal law to the contrary. *See, e.g., United States v. Wheeler*, 435 U.S. 313, 322 (1978). The Supreme Court, however, did not suggest that federal law overcomes such tribal authority only if it is explicitly directed at Indians.

<sup>9</sup> No court of appeals has addressed the application of the self-governance exception in the context of tribal schools. Most court of appeals cases have addressed whether a tribe’s commercial activities fell within this exception, with the majority holding that they did not. *See Farris*, 624 F.2d at 893; *Fla. Paralegic Ass’n*, 166 F.3d at 1129–30 (ADA applicable to tribally owned and operated restaurant and entertainment facility); *Coeur d’Alene Tribal Farm*, 751 F.2d at 1116 (OSHA applicable to tribally owned and operated farm); *Dep’t of Labor v. Occupational Safety & Health Comm’n*, 935 F.2d 182, 186 (9th Cir. 1991) (OSHA applicable to tribally owned timber mill); *Smart*, 868 F.2d at 935 & n.5 (ERISA applicable to benefit plan of tribally owned health care center operating solely on reservation); *Mashantucket Sand & Gravel*, 95 F.3d at 175, 179 (OSHA applicable to tribally owned construction business that functioned as “an arm of the tribe”); *NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995 (9th Cir. 2003) (NLRA applicable to contractor that provided health care to tribal members); *cf. United States v. Funmaker*, 10 F.3d 1327, 1332 (7th Cir. 1993) (“The decision-making power of Indian tribes ends . . . at the point when those decisions violate federal law designed to safeguard important federal interests”; finding that district court had jurisdiction to apply criminal law alleged to interfere with tribal self-governance). We are aware of just three cases in which courts of appeals have

The self-governance exception certainly seems to be in facial tension with the *Tuscarora* rule, which itself acknowledges no exception to the principle that “general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary.” *Tuscarora*, 362 U.S. at 120. *See also Choteau*, 283 U.S. at 696 (“The intent to exclude must be definitely expressed, where, as here, the general language of the Act laying the tax is broad enough to include the subject matter.”). Indeed, the exception seems to adopt, at least in limited circumstances, the very rule that *Tuscarora* rejected. In particular, *Tuscarora* confronted an earlier Supreme Court decision that had held that “[u]nder the Constitution of the United States, as originally established, . . . [g]eneral Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them,” *see Tuscarora*, 362 U.S. at 115–16 (quoting *Elk v. Wilkins*, 112 U.S. 94, 99–100 (1884))—precisely the rule adopted by the self-governance exception for laws that “touch[] ‘exclusive rights of self-governance in purely intramural matters.’” *Tuscarora*, however, explicitly rejected this rule, explaining that “[h]owever that may have been, it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests.” 362 U.S. at 116. *Tuscarora* acknowledged no exception to this general principle for laws that “touch[]

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actually asserted the self-governance exception as the basis for exempting tribal entities from otherwise generally applicable federal statutes. In one, the court, contrary to the decisions above, applied the exception to a tribal commercial entity in an employment dispute. *See, e.g., Fond du Lac*, 986 F.2d at 249 (Age Discrimination in Employment Act (“ADEA”) inapplicable to a dispute involving a tribe member and tribally owned and operated construction company). Another applied the exception to an employment dispute between the tribal housing authority and a tribal employee, *see EEOC v. Karuk Tribe Housing Auth.*, 260 F.3d 1071, 1073 (9th Cir. 2001) (finding ADEA inapplicable), and a third held certain federal civil rights laws inapplicable to a claim that tribal membership had been denied to certain individuals on account of their race, *see Nero*, 892 F.2d at 1463 (noting that “no right is more integral to a tribe’s self-governance than its ability to establish its membership”). *Cf. Taylor v. Ala. Intertribal Council*, 261 F.3d 1032 (11th Cir. 2001) (apparently applying self-governance exception to find employment discrimination suit barred by tribal sovereign immunity). Although four other cases are sometimes cited in support of the self-governance exception, on close analysis, we find these cases inapposite. *Reich v. Great Lakes Indian Fish & Wildlife Commission*, 4 F.3d 490 (7th Cir. 1993), and *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002), are, in our view, best understood as involving the ambiguity-resolving canon, not the self-governance exception to *Tuscarora*. *See Great Lakes*, 4 F.3d at 494 (finding an “extrinsic ambiguity” in the statute because “[a] literal reading of [it] would create a senseless distinction between Indian police [who were literally covered by the statute] and all other public police [who were explicitly exempted from it]”); *Pueblo of San Juan*, 276 F.3d at 1191–98 (repeatedly citing the ambiguity-resolving canon to hold that a tribal right-to-work ordinance was not preempted by the National Labor Relations Act). And *Donovan v. Navajo Forest Products Industries*, 692 F.2d 709 (10th Cir. 1982), and *EEOC v. Cherokee Nation*, 871 F.2d 937, 938–39 (10th Cir. 1989), involved conflicts between a generally applicable statute and a treaty right, which, we have explained, stands on different footing than the exception for intramural activities. *See supra* note 6. *See also Navajo Forest*, 692 F.2d at 711 (“*Tuscarora* did not . . . involve an Indian treaty. Therein lies the distinguishing feature between the case at bar and the *Tuscarora* line of cases, which stand for the rule that under statutes of general application Indians are treated as any other person, unless Congress expressly excepts them therefrom.”); *Cherokee Nation*, 871 F.2d at 938 n.3 (asserting that “the so-called *Tuscarora* rule is not applicable to treaty cases such as this one”).

‘exclusive rights of self-governance in purely intramural matters.’” This is significant because the law at issue in that case, the Federal Power Act, authorized the recipient of a federal license to condemn land owned by an Indian tribe—a law that would seem to affect tribal self-government. *Id.* at 123–24. Indeed, it was the impact of the Federal Power Act on “the tribal way of life” that caused Justice Black to dissent in that case. *Id.* at 131–42 (Black, J., dissenting) (objecting to majority’s application of Federal Power Act to tribal homeland in the absence of clear congressional authorization as contrary to Congress’s longstanding policy of protecting Indian reservations).

Nor does the Supreme Court case law cited by the courts of appeals seem to support a self-governance exception to the *Tuscarora* rule. These courts have generally cited the following Supreme Court cases in support of the exception: *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Roff v. Burney*, 168 U.S. 218 (1897); *Jones v. Meehan*, 175 U.S. 1 (1899); *United States v. Quiver*, 241 U.S. 602 (1916); *United States v. Dion*, 476 U.S. 734 (1986); and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). *See, e.g., Farris*, 624 F.2d at 893; *Fond du Lac*, 986 F.2d at 248–49; *Navajo Forest*, 692 F.2d at 713. But it is difficult to see how any of these cases supports the self-governance exception. Unlike numerous decisions of the courts of appeals, none of these Supreme Court cases explicitly acknowledges an exception to the *Tuscarora* rule. Nor do they seem to support such an exception by implication. Two, for example, did not involve generally applicable statutes, but rather, statutes that specifically applied to Indians and Indian tribes; the only issue, then, was the scope of their coverage. *See Santa Clara Pueblo*, 436 U.S. at 55–56 (interpreting the scope of the Indian Civil Rights Act); *Quiver*, 241 U.S. at 605 (interpreting a statute providing that “so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian country”). Others, while recognizing certain areas of regulation as central to Indian self-government, involved no conflict with federal law, generally applicable or otherwise. *See Roff*, 168 U.S. at 222 (tribal citizenship); *Jones*, 175 U.S. at 29 (inheritance rights); *Jicarilla Apache Tribe*, 455 U.S. at 141 (tribal authority to tax non-Indians who conduct business on reservation). And one, in addition to involving a purported conflict with a treaty (as opposed to an undefined notion of self-government), *see supra* note 7, actually found that the treaty right was *abrogated* by the generally applicable federal law. *See Dion*, 476 U.S. at 738 (Eagle Protection Act abrogated Indian treaty hunting rights).

In short, we simply cannot say with any confidence that the self-governance exception to the *Tuscarora* rule reflects a proper reading of Supreme Court precedent. In the end, however, we need not resolve this question. For the reasons explained below, we conclude that this self-governance exception, even assuming its validity, does not bar application of section 504 of the Rehabilitation Act to tribally controlled schools.

**B.**

Even assuming *arguendo* that there is an exception to the *Tuscorora* rule for general acts of Congress that touch upon the tribes’ “exclusive rights of self-governance in purely intramural matters,” we conclude that this self-governance exception is inapplicable to this case.

First of all, it is unclear whether this exception would encompass tribal schools at all. It is, of course, true that, as a general matter, education is central to self-government. But this exception to *Tuscorora* (assuming it exists) arguably is more limited. That is, it arguably encompasses not *any* activity that is central to self-government, but rather, only those activities that have, as a historical matter, been left to the control of the Indian tribes, free from federal interference, as part of their residual sovereignty—in other words, only those activities that have *in fact* been left within the control of the Indian tribes. Hence, in describing the rights of Indian tribes that are central to their internal self-government, the Supreme Court has consistently limited its enumeration to rules governing tribal membership, inheritance, and domestic relations. See, e.g., *Wheeler*, 435 U.S. at 322 & n.18 (“unless limited by treaty or statute, a tribe has the power to determine tribe membership, to regulate domestic relations among tribe members, and to prescribe rules for the inheritance of property”) (citations omitted); *Santa Clara Pueblo*, 436 U.S. at 55–56 (citing “membership,” “inheritance rules,” and “domestic relations” as examples of tribes’ “power to make their own substantive law in internal matters”). See also *Farris*, 624 F.2d at 893 (identifying “tribal membership,” “inheritance rules,” and “domestic relations” as possible examples of “exclusive rights of self-governance in purely intramural matters”); *supra* note 8 (citing cases).<sup>10</sup> Tribal schools, in contrast, have, as a historical matter, been subject to extensive federal control. See, e.g., *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 839–40 (1982) (“The Federal Government’s concern with the education of Indian children can be traced back to the first

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<sup>10</sup> We acknowledge, as discussed above, that some courts have taken a broader view of the exception. See *Fond du Lac*, 986 F.2d at 249 & n.3 (subjecting employment relationship between tribal member and tribal business to federal control and supervision “dilutes the sovereignty of the tribe”; recognizing disagreement with other courts); *Karuk Tribe*, 260 F.3d at 1080–81 (exception applies to purely internal employment dispute between tribal member and tribal government, where tribal government is providing a governmental service). These decisions, however, are in tension with those of other courts that have interpreted the exception more narrowly. See, e.g., *Mashantucket Sand & Gravel*, 95 F.3d at 179 (“tribal power, even regarding exclusively internal conflicts, may be limited by treaty or federal statute, including statutes that are silent as to Indians,” noting that “the *Coeur d’Alene* intramural exception does not include *all* aspects of sovereignty”) (citations omitted); *Smart*, 868 F.2d at 935 & n.5 (rejecting view that exception applies whenever a statute “affects self-governance as broadly conceived,” noting that “[a]ny federal statute applied to . . . a Tribe has the arguable effect of eviscerating self-governance since it amounts to a subordination of the Indian government”); see also *supra* note 8 (citing other cases). Moreover, neither *Fond du Lac* nor *Karuk Tribe* addresses the impact of any congressional statutes that state Congress’s understanding of the scope of the statute in question or the extensive federal regulation of the subject matter to which the statute arguably applies.

treaties between the United States and the Navajo Tribe. Since that time, Congress has enacted numerous statutes empowering the BIA to provide for Indian education both on and off the reservation” (footnote omitted) (citing statutes); 25 U.S.C.A. § 2000 (declaring “that the Federal Government has the sole responsibility for the operation and financial support of the Bureau of Indian Affairs funded school system that it has established on or near Indian reservations and Indian trust lands throughout the Nation for Indian children”).<sup>11</sup>

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<sup>11</sup> The BIA school system includes 184 elementary and secondary schools on 63 reservations in 23 states, of which 64 are operated directly by the BIA and 120 are operated by tribes under contract or grant with the BIA; the BIA also operates two postsecondary institutions and provides funding to 25 tribal colleges and universities. See U.S. Dep’t of the Interior, Bureau of Indian Affairs, Office of Indian Education Programs, *Fingertip Facts 2004 at 7*, available at <http://www.oiep.bia.edu/> (last visited Oct. 6, 2004)); see also Susan Faircloth & John W. Tippeconnic III, *Issues in the Education of American Indian and Alaska Native Students with Disabilities* (Dec. 2000) (ERIC Clearinghouse EDO-RC-00-3) (of the approximately 500,000 Indian and Alaska Native children who attend elementary and secondary schools, about 90% attend regular public schools, about 10% attend BIA-funded schools, and a small number attend private schools). See also Felix S. Cohen, *Handbook of Federal Indian Law* 680–83 (1982) (setting forth a detailed history of the BIA school system). These schools are subject to extensive federal regulation. See, e.g., 25 U.S.C. § 2502(e) (Supp. I 2001) (grants provided to tribally controlled schools “shall not terminate, modify, suspend, or reduce the responsibility of the Federal Government to provide a program”); 25 U.S.C. § 450a(c) (2000) (“The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.”); 25 U.S.C.A. § 2016 (West Supp. 2003) (authorizing the Secretary of the Interior to “prescribe such rules and regulations as are necessary to ensure the constitutional and civil rights of Indian students attending Bureau-funded schools, including such students’ rights to—(1) privacy under the laws of the United States; (2) freedom of religion and expression; and (3) due process in connection with disciplinary actions, suspensions, and expulsions”); 25 C.F.R. § 32.4(b), (w) (2004) (directing the Assistant Secretary for Indian Affairs to “[e]nsure the constitutional, statutory, civil and human rights of all Indian and Alaska Native students” and “[e]stablish and enforce policies and practices to guarantee equal opportunity and open access to all Indian and Alaska Native students in all matters relating to their education programs consistent with the provisions of the Privacy and Freedom of Information Acts”). In addition, tribally controlled schools must, as a condition of receiving federal grants and contracts, expressly agree to comply with section 504 of the Rehabilitation Act. See, e.g., 28 C.F.R. § 33.41(f)(10) (2003) (requiring assurance in application for Department of Justice grant programs that applicant and all subgrantees “will comply . . . with the non-discrimination requirements of . . . section 504 of the Rehabilitation Act of 1973”); *id.* § 33.52 (2003) (funding recipients are subject to section 504); *id.* § 42.504(a) (2003) (“Every application for Federal financial assistance [from the Department of Justice] shall contain an assurance that the program will be conducted in compliance with the requirements of section 504 . . . .”); *Grants and Cooperative Agreements with State and Local Governments*, OMB Circular No. A-102 (1997) (requiring executive agencies to use standard assurances forms when awarding grants or cooperative agreements to tribal governments as well as state and local governments); cf. *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1286–89 (11th Cir. 2001) (fact that tribal government signed assurance did not waive tribal sovereign immunity against private suit); *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1044 n.2 (8th Cir. 2000) (same). See also *Dep’t of Transp. v. Paralyzed Veterans*, 477 U.S. 597, 605 (1986) (acceptance of funds under section 504 and similar statutes is “in the nature of a contract . . . the recipient’s acceptance of the funds triggers coverage under the nondiscrimination provision”); *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (same).

In the end, however, we need not decide whether the self-governance exception would extend to tribal schools at all, for whatever the outer limits of the exception, we do not believe it applies where, as here, Congress has specifically stated in statutes its belief that a particular statute applies to Indians. At most, the self-governance exception is a tool to infer whether Congress intended a statute to apply to Indians where the statute does not explicitly so provide. And, as we have explained, it is a tool that is in some tension with the ordinarily dispositive rule that where a statute's meaning is plain, that plain meaning must govern—a rule reflected in *Tuscarora*. In this light, it is difficult to understand how a statute could be interpreted contrary to its plain meaning, pursuant to a canon intended to infer congressional intent in the face of silence, where Congress has, in other statutes, unequivocally stated its understanding of the statute in question. And that is precisely the situation that we confront. For Congress has specifically and explicitly stated its view that section 504 of the Rehabilitation Act applies to tribally controlled schools. As we have explained, the Education Amendments of 1978 directed the Secretary of the Interior to “immediately begin to bring all schools, dormitories, and other facilities operated by the Bureau or under contract with the Bureau in connection with the education of Indian children into compliance with . . . section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794),” Pub. L. No. 95-561, § 1125, 92 Stat. at 2319, and the No Child Left Behind Act of 2001 requires that “[t]he Secretary shall immediately begin to bring all schools, dormitories, and other Indian education-related facilities operated by the Bureau or under contract or grant with the Bureau, into compliance with . . . section 794 of Title 29 [section 504].” 25 U.S.C. § 2005(b)(1). Accordingly, the self-governance exception is simply inapplicable to this case.

We therefore conclude that section 504 of the Rehabilitation Act generally applies to tribally controlled schools that receive federal financial assistance from the Department of Justice.

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## Terms of Members of the Civil Rights Commission

The six-year term of a member of the United States Commission on Civil Rights runs from the date on which his or her predecessor's term ends, not from the date of the member's appointment.

November 30, 2004

### MEMORANDUM OPINION FOR THE DEPUTY COUNSEL TO THE PRESIDENT

You have asked for our opinion about the date on which the terms of the current Chairperson and Vice Chairperson of the United States Commission on Civil Rights ("Commission") will expire. We conclude that the terms of these two members will expire on December 5, 2004, six years after the expiration of their predecessors' terms.

The Commission, which investigates various forms of discrimination, 42 U.S.C. § 1975(a) (2000), consists of eight members. The President appoints four members, and the President pro tempore of the Senate and the Speaker of the House of Representatives each appoint two. *Id.* § 1975(b). The statute provides that "[t]he term of office of each member of the Commission shall be 6 years." *Id.* § 1975(c).<sup>1</sup>

On January 26, 1999, President Clinton appointed to the Commission the two members who are the current Chairperson and Vice Chairperson. In each case, the term of the member's predecessor had expired on December 5, 1998, and the commissions for the new members were "for a term expiring December 5, 2004."<sup>2</sup> We understand that the Chairperson now takes the position that her term expires in January 2005.

In *United States v. Wilson*, 290 F.3d 347 (D.C. Cir.), *cert. denied*, 537 U.S. 1028 (2002), the Court of Appeals for the D.C. Circuit held that the six-year term of a member of the Commission runs from the date on which his or her predecessor's term ends, not from the date of the member's appointment. That decision is consistent with the prior opinion of this Office, which also had concluded that a member's term begins when his or her predecessor's ends, *see Duration of the Term of a Member of the Civil Rights Commission*, 25 Op. O.L.C. 225 (2001); the Department advanced that view in litigation, *see, e.g.,* Opening Brief for Appellants, *United States v. Wilson*, 290 F.3d 347 (D.C. Cir. 2002) (No. 02-5047) (brief filed Mar. 2002); and the court of appeals agreed.

The holding in the *Wilson* case is squarely applicable here. President Clinton had appointed Victoria Wilson upon the death of her predecessor. Her commission

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<sup>1</sup> With the concurrence of the Commission's members, the President designates a Chairperson and Vice Chairperson from among the members. *Id.* § 1975(d)(2).

<sup>2</sup> The quoted language comes from the records of the State Department, which keeps typed replicas of commissions.

stated that her appointment was “for the remainder of the term expiring” six years after her predecessor’s appointment. 290 F.3d at 350 (quoting commission). After the termination date in the commission, President Bush appointed a successor, but Ms. Wilson maintained that her term continued until six years after her appointment and thus had not ended. In the litigation that followed her refusal to give way to her successor, she pointed out that, before amendments in 1994, the applicable statute expressly stated that a Commission member appointed to fill a vacancy would serve only the remainder of his or her predecessor’s term, but in 1994 this language was deleted. Ms. Wilson contended that, in these circumstances, the statutory provision under which “[t]he term of office of each member of the Commission shall be 6 years,” 42 U.S.C. § 1975(c), unambiguously makes the term run from the time of appointment, and the different date in her commission could not overcome the requirement of the statute.

Although Ms. Wilson prevailed in the district court, a unanimous panel of the court of appeals reversed that decision and rejected her argument. The court found the phrase “term of office” ambiguous, since the six-year period could “either run with the person or with the calendar.” 290 F.3d at 353. The term would “run with the person” if “[e]ach individual member of the Commission, however appointed, whenever appointed, is entitled to serve a six-year period of time.” *Id.* The term would “run[] with the calendar” if “each member of the Commission must be assigned to a fixed, six-year ‘slot’ of time,” beginning with the end of his or her predecessor’s term. *Id.* The court then reasoned from a transitional provision in the 1994 amendment, under which “[t]he term of each member of the Commission in the initial membership of the Commission [under the amendment] shall expire on the date such term would have expired as of September 30, 1994.” 42 U.S.C. § 1975(b)(1). On that date, the members of the Commission were serving staggered terms, with half of the members’ terms expiring every three years. The court wrote that this language “provides an ‘anchor’—fixed times for terms of Commissioners to expire,” corresponding to the staggered terms that the members were serving at the time of the 1994 amendment. 290 F.3d at 355. The provision “creates a pattern of staggered appointments,” and “[s]taggered terms must run with the calendar, rather than with the person, to preserve staggering.” *Id.* Therefore,

any appointment to fill a vacancy for an unexpired term, such as Ms. Wilson’s appointment, must only be for the duration of that unexpired term. For it to be otherwise would disrupt the fixed and staggered six-year terms that run with the calendar.

*Id.* This interpretation, the court went on, was confirmed by “relevant practices of the Executive Branch,” creating “background understandings” that Congress is “presumed to preserve, not abrogate.” *Id.* at 356. President Clinton had followed this practice in appointing Ms. Wilson to the remainder of her predecessor’s term,

as specified in Ms. Wilson's commission. *Id.* at 358.<sup>3</sup> The court's conclusion also fit with the "'context' . . . [of] related provisions in historically antecedent statutes," *id.* at 359 (citation omitted), and it avoided such anomalous results as the "political manipulation" of "concerted resignations near the end of a President's term" that would allow new appointments for full six-year periods, *id.* at 361.

There is no fair ground for distinguishing *Wilson* here. If a member's six-year term runs with the calendar, the Chairperson's and the Vice Chairperson's terms must end on December 5, 2004—six years after their predecessors' terms expired. It cannot make a difference that these two members were appointed after their predecessors' terms expired, while Ms. Wilson was appointed to fill out the unexpired portion of a prior term. In the case of either a delayed appointment or an unexpired term, a six-year term calculated from the date of appointment would "disrupt the fixed and staggered six-year terms that run with the calendar." *Id.* at 355. To avoid this disruption, the Chairperson's and Vice Chairperson's terms must expire on the date given in their commissions, which is six years after their predecessors' terms ended.

Indeed, the court in *Wilson* addressed, and dismissed, the possibility that the method for calculating the terms for delayed appointments might differ from the method for unexpired terms. Counsel had apparently conceded at oral argument that the current Chairperson's and Vice Chairperson's terms ran with the calendar, but tried to distinguish the term of a member appointed to fill a vacancy before a predecessor's term expired. *Id.*<sup>4</sup> The court rejected any distinction between the two situations:

This anomalous result [that the two situations would be treated differently] further undermines appellee's interpretation of the statute. We have difficulty believing that Congress *sub silentio* created two different tracks with full six-year terms for those commissioners who succeeded appointees who by reason of death or resignation did not serve out their full terms, but truncated terms for those who succeeded members who served for six years but whose vacancy was not immediately filled by Presidential appointment. Nothing in section 1975(c) gives any indication that the phrase "the term of office of each member of the Commission" has two different meanings for two distinct classes of commissioner not otherwise recognized in the statute. The lack of such differentiation and appellee's concession that "delayed appointees" serve terms shortened by the interval between the expiration of the predecessors' term and the date of their

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<sup>3</sup> The commissions for the current Chairperson and Vice Chairperson also reflect this practice.

<sup>4</sup> The current Chairperson and Vice Chairperson had intervened in the *Wilson* case. *Id.* at 351–52. We have been unable to determine whether the counsel who made the concession was the one representing them or the separate counsel representing Ms. Wilson.

appointment further supports our interpretation that, read together, the two sentences of [section] 1975(c) [one setting a six-year term, the other providing for terms to expire as they were set to do as of September 30, 1994] create fixed six-year terms that run with the calendar.

*Id.* at 355–56.

We understand that a personnel form for the current Chairperson may indicate that her term does not expire until January 2005. The statute, however, sets the terms of the members. *See, e.g., Quackenbush v. United States*, 177 U.S. 20, 27 (1900) (“the terms of the commission cannot change the effect of the appointment as defined by the statute”); *Case of Chief Constructor Easby*, 16 Op. Att’y Gen. 656 (1880); *Impact of Panama Canal Zone Treaty on the Filling of the Vacancy in the Office of the District Judge for the United States District Court for the District of the Canal Zone*, 1 Op. O.L.C. 236, 237 n.4 (1977); Memorandum for John W. Dean III, Counsel to the President, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Presidential Commissions* at 5 (Dec. 1, 1971); *see also Wilson*, 290 F.3d at 358–59. Furthermore, under the statute, it is the President, not the Commission, who makes the appointment to the statutory term, 42 U.S.C. § 1975(c), and the President’s appointments here, in accordance with the commissions he issued, were for terms ending December 5, 2004. The personnel records of the Commission do not override the statutory requirements.

*Wilson*, which adopted the statutory interpretation that the Justice Department advanced and that we still hold, disposes of the question you have asked. Consistent with the provisions of the commissions signed by President Clinton, the terms for the current Chairperson and Vice Chairperson will expire December 5, 2004.

DANIEL L. LEVIN  
*Acting Assistant Attorney General*  
*Office of Legal Counsel*

## Political Balance Requirement for the Civil Rights Commission

In appointing a new member to the United States Commission on Civil Rights, in order to comply with the statutory requirement that “[n]ot more than 4 of the members shall at any one time be of the same political party,” the President should look to the party affiliation of the other members at the time the new member is appointed.

December 6, 2004

### MEMORANDUM OPINION FOR THE DEPUTY COUNSEL TO THE PRESIDENT

You have asked for our opinion concerning the proper interpretation of the statutory provision that “[n]ot more than 4 of the members” of the United States Commission on Civil Rights (“Commission”) “shall at any one time be of the same political party.” 42 U.S.C. § 1975(b) (2000). Specifically, you have asked whether, in the appointment of a new member to the Commission, the relevant consideration is the party affiliation of the other members at the time the new member is appointed (which would take into account any changes in party affiliation by those other members after their appointment to the Commission), or whether it is the party affiliation of the other members at the time those other members were appointed (which would not take into account any such post-appointment changes in party affiliation). We conclude that the plain language of the statute makes clear that the relevant consideration is the party affiliation of the other members at the time the new member is appointed.

The Commission consists of eight members, of whom the President appoints four and the President pro tempore of the Senate and the Speaker of the House of Representatives each appoint two. *Id.* § 1975(b). The statute provides that “[n]ot more than 4 of the members shall at any one time be of the same political party.” *Id.* It also provides that, of the two members appointed by the President pro tempore of the Senate, “not more than one shall be appointed from the same political party.” *Id.* § 1975(b)(2). The statute imposes the same requirement for the appointees of the Speaker of the House. *Id.* § 1975(b)(3).

By its terms, the provision that “[n]ot more than 4 of the members shall at any one time be of the same political party” applies at all times.<sup>1</sup> This is in keeping with its apparent purpose of maintaining some degree of political balance on the Commission. *See* 140 Cong. Rec. 27,216 (Oct. 3, 1994) (statement of Rep. Edwards) (the Commission is a “bipartisan, independent Federal factfinding agency”). And this means that the relevant consideration when a new member is appointed is the party affiliation of the other members at the time the new member is appointed.

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<sup>1</sup> We do not address what the appropriate remedy would be, should a change in affiliation result in more than four members from the same political party.

This conclusion is reinforced by the contrast between the “at any one time” language in the provision at issue and the two appearances of the “appointed from the same political party” formulation in other provisions of the same statute dealing with party affiliation. The requirements that, of the two members appointed by each of the congressional leaders, “not more than one shall be appointed from the same political party” expressly refer to party affiliation at the time of appointment. We addressed a similar issue in a Memorandum for Dudley H. Chapman, Associate Counsel to the President, from Leon Ulman, Acting Assistant Attorney General, Office of Legal Counsel, *Re: The Status of Members of the Board of Trustees of the Woodrow Wilson International Center for Scholars* (June 27, 1975) (“*Status of Members*”). There, the statute required that certain members of the Board of Trustees of the Woodrow Wilson International Center for Scholars be “appointed” or “chosen” “from” private life. *See* 20 U.S.C. § 80f(b)(8), (d), (e) (2000). “The implication,” we wrote, “is that while Congress was clearly concerned with the station from which a given trustee is appointed, it was not concerned with the problem of a trustee who after appointment joins the government.” *Status of Members* at 1. We noted that Congress elsewhere had provided that a member of a different board, upon a change of status, would lose his position, but had chosen not to use that language for trustees of the Woodrow Wilson International Center for Scholars. Here, too, the “appointed from the same political party” language is tied to the time of appointment, not to subsequent service, 42 U.S.C. § 1975(b)(2), (3), and a change in the political affiliation of these appointees therefore would not implicate that requirement.

The contrast in language between the “appointed from the same political party” formulation and the “at any one time be of the same political party” formulation underscores the differences in the relevant times for the provisions. “[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 46:06, at 194 (6th ed. 2000)). “[A]ppointed from the same political party” clearly refers to party affiliation at the time of appointment; “at any one time be of the same political party” clearly is not limited to the time of appointment. Consequently, in appointing a new member, in order to comply with the requirement that “[n]ot more than 4 of the members shall at any one time be of the same political party,” the President should look to the party affiliation of the other members at the time the new member is appointed.

DANIEL L. LEVIN

*Acting Assistant Attorney General  
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## Definition of Torture Under 18 U.S.C. §§ 2340–2340A

This opinion interprets the federal criminal prohibition against torture codified at 18 U.S.C. §§ 2340–2340A. It supersedes in its entirety the August 1, 2002 opinion of this Office entitled *Standards of Conduct* under 18 U.S.C. §§ 2340–2340A.

That statute prohibits conduct “specifically intended to inflict severe physical or mental pain or suffering.” This opinion concludes that “severe” pain under the statute is not limited to “excruciating or agonizing” pain or pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily functions, or even death.”

The statute also prohibits certain conduct specifically intended to cause “severe physical suffering” distinct from “severe physical pain.”

December 30, 2004

### MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

Torture is abhorrent both to American law and values and to international norms. This universal repudiation of torture is reflected in our criminal law, for example, 18 U.S.C. §§ 2340–2340A; international agreements, exemplified by the United Nations Convention Against Torture (the “CAT”);<sup>1</sup> customary international law;<sup>2</sup> centuries of Anglo-American law;<sup>3</sup> and the longstanding policy of the United States, repeatedly and recently reaffirmed by the President.<sup>4</sup>

This Office interpreted the federal criminal prohibition against torture—codified at 18 U.S.C. §§ 2340–2340A—in *Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A* (Aug. 1, 2002) (“August 2002 Memorandum”). The August 2002 Memorandum also addressed a number of issues beyond interpretation of those statutory provisions, including the President’s Commander

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<sup>1</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the U.N. General Assembly Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85. See also, e.g., International Covenant on Civil and Political Rights, adopted by the U.N. General Assembly Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171.

<sup>2</sup> It has been suggested that the prohibition against torture has achieved the status of *jus cogens* (i.e., a peremptory norm) under international law. See, e.g., *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992); *Regina v. Bow Street Metro. Stipendiary Magistrate and others, Ex Parte Pinochet Ugarte (No. 3)*, [2000] 1 A.C. 147, 198; see also Restatement (Third) of Foreign Relations Law of the United States § 702 reporters’ note 5.

<sup>3</sup> See generally John H. Langbein, *Torture and the Law* (1977).

<sup>4</sup> See, e.g., Statement on United Nations International Day in Support of Victims of Torture, 40 Weekly Comp. Pres. Doc. 1167 (July 5, 2004) (“Freedom from torture is an inalienable human right”); Statement on United Nations International Day in Support of Victims of Torture, 39 Weekly Comp. Pres. Doc. 824 (June 30, 2003) (“Torture anywhere is an affront to human dignity everywhere.”); see also Letter of Transmittal from President Ronald Reagan to the Senate (May 20, 1988), in *Message from the President of the United States Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, S. Treaty Doc. No. 100-20, at iii (1988) (“Ratification of the Convention by the United States will clearly express United States opposition to torture, an abhorrent practice unfortunately still prevalent in the world today.”).

in Chief power, and various defenses that might be asserted to avoid potential liability under sections 2340–2340A. *See id.* at 31–46.

Questions have since been raised, both by this Office and by others, about the appropriateness and relevance of the non-statutory discussion in the August 2002 Memorandum, and also about various aspects of the statutory analysis, in particular the statement that “severe” pain under the statute was limited to pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” *Id.* at 1.<sup>5</sup> We decided to withdraw the August 2002 Memorandum, a decision you announced in June 2004. At that time, you directed this Office to prepare a replacement memorandum. Because of the importance of—and public interest in—these issues, you asked that this memorandum be prepared in a form that could be released to the public so that interested parties could understand our analysis of the statute.

This memorandum supersedes the August 2002 Memorandum in its entirety.<sup>6</sup> Because the discussion in that memorandum concerning the President’s Commander in Chief power and the potential defenses to liability was—and remains—unnecessary, it has been eliminated from the analysis that follows. Consideration of the bounds of any such authority would be inconsistent with the President’s unequivocal directive that United States personnel not engage in torture.<sup>7</sup>

We have also modified in some important respects our analysis of the legal standards applicable under 18 U.S.C. §§ 2340–2340A. For example, we disagree with statements in the August 2002 Memorandum limiting “severe” pain under the statute to “excruciating and agonizing” pain, *id.* at 19, or to pain equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death,” *id.* at 1. There are additional areas

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<sup>5</sup> *See, e.g.*, Anthony Lewis, *Making Torture Legal*, N.Y. Rev. of Books, July 15, 2004; R. Jeffrey Smith, *Slim Legal Grounds for Torture Memos*, Wash. Post, July 4, 2004, at A12; Kathleen Clark & Julie Mertus, *Torturing the Law; the Justice Department’s Legal Contortions on Interrogation*, Wash. Post, June 20, 2004, at B3; Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 Cornell L. Rev. 97 (2004).

<sup>6</sup> This memorandum necessarily discusses the prohibition against torture in sections 2340–2340A in somewhat abstract and general terms. In applying this criminal prohibition to particular circumstances, great care must be taken to avoid approving as lawful any conduct that might constitute torture. In addition, this memorandum does not address the many other sources of law that may apply, depending on the circumstances, to the detention or interrogation of detainees (for example, the Geneva Conventions; the Uniform Code of Military Justice, 10 U.S.C. §§ 801 *et seq.*; the Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261–3267; and the War Crimes Act, 18 U.S.C. § 2441, among others). Any analysis of particular facts must, of course, ensure that the United States complies with all applicable legal obligations.

<sup>7</sup> *See, e.g.*, Statement on United Nations International Day in Support of Victims of Torture, 40 Weekly Comp. Pres. Doc. 1167–68 (July 5, 2004) (“America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture . . . in all territory under our jurisdiction. . . . Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere.”).

where we disagree with or modify the analysis in the August 2002 Memorandum, as identified in the discussion below.<sup>8</sup>

The Criminal Division of the Department of Justice has reviewed this memorandum and concurs in the analysis set forth below.

## I.

Section 2340A provides that “[w]hoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.”<sup>9</sup> Section 2340(1) defines “torture” as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.”<sup>10</sup>

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<sup>8</sup> While we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office’s prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.

<sup>9</sup> Section 2340A provides in full:

- (a) Offense.—Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.
- (b) Jurisdiction.—There is jurisdiction over the activity prohibited in subsection (a) if—
  - (1) the alleged offender is a national of the United States; or
  - (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.
- (c) Conspiracy.—A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

18 U.S.C. § 2340A (2000).

<sup>10</sup> Section 2340 provides in full:

As used in this chapter—

- (1) “torture” means an act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
- (2) “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from—
  - (A) the intentional infliction or threatened infliction of severe physical pain or suffering;

In interpreting these provisions, we note that Congress may have adopted a statutory definition of “torture” that differs from certain colloquial uses of the term. *Cf. Cadet v. Bulger*, 377 F.3d 1173, 1194 (11th Cir. 2004) (“[I]n other contexts and under other definitions [the conditions] might be described as torturous. The fact remains, however, that the only relevant definition of ‘torture’ is the definition contained in [the] CAT.”). We must, of course, give effect to the statute as enacted by Congress.<sup>11</sup>

Congress enacted sections 2340–2340A to carry out the United States’ obligations under the CAT. *See* H.R. Conf. Rep. No. 103-482, at 229 (1994). The CAT, among other things, obligates state parties to take effective measures to prevent acts of torture in any territory under their jurisdiction, and requires the United States, as a state party, to ensure that acts of torture, along with attempts and complicity to commit such acts, are crimes under U.S. law. *See* CAT arts. 2, 4–5. Sections 2340–2340A satisfy that requirement with respect to acts committed outside the United States.<sup>12</sup> Conduct constituting “torture” occurring within the United States was—and remains—prohibited by various other federal and state criminal statutes that we do not discuss here.

The CAT defines “torture” so as to require the intentional infliction of “severe pain or suffering, whether physical or mental.” Article 1(1) of the CAT provides:

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person,

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(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; and

(3) “United States” means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.

18 U.S.C. § 2340 (as amended by Pub. L. No. 108-375, 118 Stat. 1811 (2004)).

<sup>11</sup> Our task is only to offer guidance on the meaning of the statute, not to comment on policy. It is of course open to policymakers to determine that conduct that might not be prohibited by the statute is nevertheless contrary to the interests or policy of the United States.

<sup>12</sup> Congress limited the territorial reach of the federal torture statute, providing that the prohibition applies only to conduct occurring “outside the United States,” 18 U.S.C. § 2340A(a), which is currently defined in the statute to mean outside “the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.” *Id.* § 2340(3).

or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The Senate attached the following understanding to its resolution of advice and consent to ratification of the CAT:

The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

S. Exec. Rep. No. 101-30, at 36 (1990). This understanding was deposited with the U.S. instrument of ratification on October 21, 1994, *see* 1830 U.N.T.S. 320, and thus defines the scope of the United States’ obligations under the treaty. *See Relevance of Senate Ratification History to Treaty Interpretation*, 11 Op. O.L.C. 28, 32–33 (1987). The criminal prohibition against torture that Congress codified in 18 U.S.C. §§ 2340–2340A generally tracks the prohibition in the CAT, subject to the U.S. understanding.

## II.

Under the language adopted by Congress in sections 2340–2340A, to constitute “torture,” the conduct in question must have been “specifically intended to inflict severe physical or mental pain or suffering.” In the discussion that follows, we will separately consider each of the principal components of this key phrase: (1) the meaning of “severe”; (2) the meaning of “severe physical pain or suffering”; (3) the meaning of “severe mental pain or suffering”; and (4) the meaning of “specifically intended.”

### A. The Meaning of “Severe”

Because the statute does not define “severe,” “we construe [the] term in accordance with its ordinary or natural meaning.” *FDIC v. Meyer*, 510 U.S. 471, 476

(1994). The common understanding of the term “torture” and the context in which the statute was enacted also inform our analysis.

Dictionaries define “severe” (often conjoined with “pain”) to mean “extremely violent or intense: *severe pain*.” *American Heritage Dictionary of the English Language* 1653 (3d ed. 1992); see also 15 *Oxford English Dictionary* 101 (2d ed. 1989) (“Of pain, suffering, loss, or the like: Grievous, extreme” and “Of events or circumstances . . . : Hard to sustain or endure”).<sup>13</sup>

The statute, moreover, was intended to implement the United States’ obligations under the CAT, which, as quoted above, defines as “torture” acts that inflict “severe pain or suffering” on a person. CAT art. 1(1). As the Senate Foreign Relations Committee explained in its report recommending that the Senate consent to ratification of the CAT:

The [CAT] seeks to define “torture” in a relatively limited fashion, corresponding to the common understanding of torture as an extreme practice which is universally condemned. . . .

The term “torture,” in United States and international usage, is usually reserved for extreme, deliberate and unusually cruel practices, for example, sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.

S. Exec. Rep. No. 101-30, at 13–14. See also David P. Stewart, *The Torture Convention and the Reception of International Criminal Law Within the United States*, 15 *Nova L. Rev.* 449, 455 (1991) (“By stressing the extreme nature of torture, . . . [the] definition [of torture in the CAT] describes a relatively limited set of circumstances likely to be illegal under most, if not all, domestic legal systems.”).

Further, the CAT distinguishes between torture and “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as

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<sup>13</sup> Common dictionary definitions of “torture” further support the statutory concept that the pain or suffering must be severe. See *Black’s Law Dictionary* 1528 (8th ed. 2004) (defining “torture” as “[t]he infliction of *intense pain* to the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure”) (emphasis added); *Webster’s Third New International Dictionary of the English Language Unabridged* 2414 (2002) (defining “torture” as “the infliction of *intense pain* (as from burning, crushing, wounding) to punish or coerce someone”) (emphasis added); *Oxford American Dictionary and Language Guide* 1064 (1999) (defining “torture” as “the infliction of *severe bodily pain*, esp. as a punishment or a means of persuasion”) (emphasis added).

This interpretation is also consistent with the history of torture. See generally the descriptions in Lord Hope’s lecture, *Torture*, University of Essex/Clifford Chance Lecture 7–8 (Jan. 28, 2004), and in Professor Langbein’s book, *Torture and the Law of Proof: Europe and England in the Ancien Régime*. We emphatically are not saying that only such historical techniques—or similar ones—can constitute “torture” under sections 2340–2340A. But the historical understanding of “torture” is relevant to interpreting Congress’s intent. Cf. *Morissette v. United States*, 342 U.S. 246, 263 (1952).

defined in article 1.” CAT art. 16. The CAT thus treats torture as an “extreme form” of cruel, inhuman, or degrading treatment. *See* S. Exec. Rep. No. 101-30, at 6, 13; *see also* J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 80 (1988) (“CAT Handbook”) (noting that Article 16 implies “that torture is the *gravest form* of [cruel, inhuman, or degrading] treatment [or] punishment”) (emphasis added); Malcolm D. Evans, *Getting to Grips with Torture*, 51 *Int’l & Comp. L.Q.* 365, 369 (2002) (The CAT “formalises a distinction between torture on the one hand and inhuman and degrading treatment on the other by attributing different legal consequences to them.”).<sup>14</sup> The Senate Foreign Relations Committee emphasized this point in its report recommending that the Senate consent to ratification of the CAT. *See* S. Exec. Rep. No. 101-30, at 13 (“‘Torture’ is thus to be distinguished from lesser forms of cruel, inhuman, or degrading treatment or punishment, which are to be deplored and prevented, but are not so universally and categorically

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<sup>14</sup> This approach—distinguishing torture from lesser forms of cruel, inhuman, or degrading treatment—is consistent with other international law sources. The CAT’s predecessor, the U.N. Torture Declaration, defined torture as “an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.” Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Res. 3452, art. 1(2) (Dec. 9, 1975) (emphasis added); *see also* S. Treaty Doc. No. 100-20 at 2 (The U.N. Torture Declaration was “a point of departure for the drafting of the [CAT].”). Other treaties also distinguish torture from lesser forms of cruel, inhuman, or degrading treatment. *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 (“European Convention”) (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”); Evans, *Getting to Grips with Torture*, 51 *Int’l & Comp. L.Q.* at 370 (“[T]he ECHR [European Court of Human Rights] organs have adopted . . . a ‘vertical’ approach . . . , which is seen as comprising three separate elements, each representing a progression of seriousness, in which one moves progressively from forms of ill-treatment which are ‘degrading’ to those which are ‘inhuman’ and then to ‘torture.’ The distinctions between them is [sic] based on the severity of suffering involved, with ‘torture’ at the apex.”); Debra Long, Association for the Prevention of Torture, *Guide to Jurisprudence on Torture and Ill-Treatment: Article 3 of the European Convention for the Protection of Human Rights* 13 (2002) (The approach of distinguishing between “torture,” “inhuman” acts, and “degrading” acts has “remained the standard approach taken by the European judicial bodies. Within this approach torture has been singled out as carrying a special stigma, which distinguishes it from other forms of ill-treatment.”). *See also* CAT Handbook at 115–17 (discussing the ECHR decision in *Ireland v. United Kingdom*, 25 *Eur. Ct. H.R.* (ser. A) (1978)) (concluding that the combined use of wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink constituted inhuman or degrading treatment but not torture under the European Convention). Cases decided by the ECHR subsequent to *Ireland* have continued to view torture as an aggravated form of inhuman treatment. *See, e.g.*, *Aktaş v. Turkey*, App. No. 24351/94, ¶ 313 (*Eur. Ct. H.R.* 2003); *Akkoç v. Turkey*, Apps. Nos. 22947/93 & 22948/93, ¶ 115 (*Eur. Ct. H.R.* 2000); *Kaya v. Turkey*, App. No. 22535/93, ¶ 117 (*Eur. Ct. H.R.* 2000).

The International Criminal Tribunal for the Former Yugoslavia (“ICTY”) likewise considers “torture” as a category of conduct more severe than “inhuman treatment.” *See, e.g.*, *Prosecutor v. Delalic*, Case No. IT-96-21, Trial Chamber Judgment ¶ 542 (*Int’l Crim. Trib. for the Former Yugoslavia* Nov. 16, 1998) (“[I]nhuman treatment is treatment which deliberately causes serious mental and physical suffering that falls short of the severe mental and physical suffering required for the offence of torture.”).

condemned as to warrant the severe legal consequences that the Convention provides in the case of torture. . . . The requirement that torture be an extreme form of cruel and inhuman treatment is expressed in Article 16, which refers to ‘other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture . . . .’”). See also *Cadet*, 377 F.3d at 1194 (“The definition in CAT draws a critical distinction between ‘torture’ and ‘other acts of cruel, inhuman, or degrading punishment or treatment.’”).

Representations made to the Senate by executive branch officials when the Senate was considering the CAT are also relevant in interpreting the CAT’s torture prohibition—which sections 2340–2340A implement. Mark Richard, a Deputy Assistant Attorney General in the Criminal Division, testified that “[t]orture is understood to be that barbaric cruelty which lies at the top of the pyramid of human rights misconduct.” *Convention Against Torture: Hearing Before the Senate Comm. on Foreign Relations*, 101st Cong. 16 (1990) (“*CAT Hearing*”) (prepared statement). The Senate Foreign Relations Committee also understood torture to be limited in just this way. See S. Exec. Rep. No. 101-30, at 6 (noting that “[f]or an act to be ‘torture,’ it must be an extreme form of cruel and inhuman treatment, causing severe pain and suffering, and be intended to cause severe pain and suffering”). Both the Executive Branch and the Senate acknowledged the efforts of the United States during the negotiating process to strengthen the effectiveness of the treaty and to gain wide adherence thereto by focusing the Convention “on torture rather than on other relatively less abhorrent practices.” Letter of Submittal from George P. Shultz, Secretary of State, to President Ronald Reagan (May 10, 1988), in S. Treaty Doc. No. 100-20, at v; see also S. Exec. Rep. No. 101-30, at 2–3 (“The United States” helped to focus the Convention “on torture rather than other less abhorrent practices.”). Such statements are probative of a treaty’s meaning. See 11 Op. O.L.C. at 35–36.

Although Congress defined “torture” under sections 2340–2340A to require conduct specifically intended to cause “severe” pain or suffering, we do not believe Congress intended to reach only conduct involving “excruciating and agonizing” pain or suffering. Although there is some support for this formulation in the ratification history of the CAT,<sup>15</sup> a proposed express understanding to that effect<sup>16</sup> was “criticized for setting too high a threshold of pain,” S. Exec. Rep. No. 101-30, at 9, and was not adopted. We are not aware of any evidence suggesting that the standard was raised in the statute and we do not believe that it was.<sup>17</sup>

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<sup>15</sup> Deputy Assistant Attorney General Mark Richard testified: “[T]he essence of torture” is treatment that inflicts “excruciating and agonizing physical pain.” *CAT Hearing* at 16 (prepared statement).

<sup>16</sup> See S. Treaty Doc. No. 100-20, at 4–5 (“The United States understands that, in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.”).

<sup>17</sup> Thus, we do not agree with the statement in the August 2002 Memorandum that “[t]he Reagan administration’s understanding that the pain be ‘excruciating and agonizing’ is in substance not different from the Bush administration’s proposal that the pain must be severe.” *Id.* at 19. Although the terms are concededly imprecise, and whatever the intent of the Reagan Administration’s understanding,

Drawing distinctions among gradations of pain (for example, severe, mild, moderate, substantial, extreme, intense, excruciating, or agonizing) is obviously not an easy task, especially given the lack of any precise, objective scientific criteria for measuring pain.<sup>18</sup> We are, however, aided in this task by judicial interpretations of the Torture Victims Protection Act (“TVPA”), 28 U.S.C. § 1350 note (2000). The TVPA, also enacted to implement the CAT, provides a civil remedy to victims of torture. The TVPA defines “torture” to include:

any act, directed against an individual in the offender’s custody or physical control, by which *severe pain or suffering* (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), *whether physical or mental*, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual

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we believe that in common usage “excruciating and agonizing” pain is understood to be more intense than “severe” pain.

The August 2002 Memorandum also looked to the use of “severe pain” in certain other statutes, and concluded that to satisfy the definition in section 2340, pain “must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” *Id.* at 1; *see also id.* at 5–6, 13, 46. We do not agree with those statements. Those other statutes define an “emergency medical condition,” for purposes of providing health benefits, as “a condition manifesting itself by acute symptoms of sufficient severity (including severe pain)” such that one could reasonably expect that the absence of immediate medical care might result in death, organ failure or impairment of bodily function. *See, e.g.*, 8 U.S.C. § 1369 (2000); 42 U.S.C. § 1395w-22(d)(3)(B) (2000); *id.* § 1395dd(e) (2000). They do not define “severe pain” even in that very different context (rather, they use it as an indication of an “emergency medical condition”), and they do not state that death, organ failure, or impairment of bodily function cause “severe pain,” but rather that “severe pain” may indicate a condition that, if untreated, could cause one of those results. We do not believe that they provide a proper guide for interpreting “severe pain” in the very different context of the prohibition against torture in sections 2340–2340A. *Cf. United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) (phrase “wages paid” has different meaning in different parts of Title 26); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343–44 (1997) (term “employee” has different meanings in different parts of Title VII).

<sup>18</sup> Despite extensive efforts to develop objective criteria for measuring pain, there is no clear, objective, consistent measurement. As one publication explains:

Pain is a complex, subjective, perceptual phenomenon with a number of dimensions—intensity, quality, time course, impact, and personal meaning—that are uniquely experienced by each individual and, thus, can only be assessed indirectly. *Pain is a subjective experience and there is no way to objectively quantify it.* Consequently, assessment of a patient’s pain depends on the patient’s overt communications, both verbal and behavioral. Given pain’s complexity, one must assess not only its somatic (sensory) component but also patients’ moods, attitudes, coping efforts, resources, responses of family members, and the impact of pain on their lives.

Dennis C. Turk, *Assess the Person, Not Just the Pain*, Pain: Clinical Updates, Sept. 1993 (emphasis added). This lack of clarity further complicates the effort to define “severe” pain or suffering.

or a third person, or for any reason based on discrimination of any kind . . . .

28 U.S.C. § 1350 note, § 3(b)(1) (emphases added). The emphasized language is similar to section 2340's "severe physical or mental pain or suffering."<sup>19</sup> As the Court of Appeals for the District of Columbia Circuit has explained:

The severity requirement is crucial to ensuring that the conduct proscribed by the [CAT] and the TVPA is sufficiently extreme and outrageous to warrant the universal condemnation that the term "torture" both connotes and invokes. The drafters of the [CAT], as well as the Reagan Administration that signed it, the Bush Administration that submitted it to Congress, and the Senate that ultimately ratified it, therefore all sought to ensure that "only acts of a certain gravity shall be considered to constitute torture."

The critical issue is the degree of pain and suffering that the alleged torturer intended to, and actually did, inflict upon the victim. The more intense, lasting, or heinous the agony, the more likely it is to be torture.

*Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 92–93 (D.C. Cir. 2002) (citations omitted). That court concluded that a complaint that alleged beatings at the hands of police but that did not provide details concerning "the severity of plaintiffs' alleged beatings, including their frequency, duration, the parts of the body at which they were aimed, and the weapons used to carry them out," did not suffice "to ensure that [it] satisf[ie]d the TVPA's rigorous definition of torture." *Id.* at 93.

In *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230 (D.C. Cir. 2003), the D.C. Circuit again considered the types of acts that constitute torture under the TVPA definition. The plaintiff alleged, among other things, that Libyan authorities had held her incommunicado and threatened to kill her if she tried to leave. *See id.* at 232, 234. The court acknowledged that "these alleged acts certainly reflect a bent toward cruelty on the part of their perpetrators," but, reversing the district court, went on to hold that "they are not in themselves so unusually cruel or sufficiently extreme and outrageous as to constitute torture within the meaning of the [TVPA]." *Id.* at 234. Cases in which courts have found torture suggest the nature of the extreme conduct that falls within the statutory definition. *See, e.g., Hilao v. Estate of Marcos*, 103 F.3d 789, 790–91, 795 (9th Cir. 1996) (concluding that a course of conduct that included, among other things, severe beatings of plaintiff, repeated threats of death and electric shock, sleep

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<sup>19</sup> Section 3(b)(2) of the TVPA defines "mental pain or suffering" similarly to the way that section 2340(2) defines "severe mental pain or suffering."

deprivation, extended shackling to a cot (at times with a towel over his nose and mouth and water poured down his nostrils), seven months of confinement in a “suffocatingly hot” and cramped cell, and eight years of solitary or near-solitary confinement constituted torture); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1332–40, 1345–46 (N.D. Ga. 2002) (concluding that a course of conduct that included, among other things, severe beatings to the genitals, head, and other parts of the body with metal pipes, brass knuckles, batons, a baseball bat, and various other items; removal of teeth with pliers; kicking in the face and ribs; breaking of bones and ribs and dislocation of fingers; cutting a figure into the victim’s forehead; hanging the victim and beating him; extreme limitations of food and water; and subjection to games of “Russian roulette” constituted torture); *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 22–23 (D.D.C. 2001) (entering default judgment against Iraq where plaintiffs alleged, among other things, threats of “physical torture, such as cutting off . . . fingers, pulling out . . . fingernails,” and electric shocks to the testicles); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 64–66 (D.D.C. 1998) (concluding that a course of conduct that included frequent beatings, pistol whipping, threats of imminent death, electric shocks, and attempts to force confessions by playing Russian roulette and pulling the trigger at each denial constituted torture).

### **B. The Meaning of “Severe Physical Pain or Suffering”**

The statute provides a specific definition of “severe mental pain or suffering,” 18 U.S.C. § 2340(2), but does not define the term “severe physical pain or suffering.” Although we think the meaning of “severe physical pain” is relatively straightforward, the question remains whether Congress intended to prohibit a category of “severe physical suffering” distinct from “severe physical pain.” We conclude that under some circumstances “severe physical suffering” may constitute torture even if it does not involve “severe physical pain.” Accordingly, to the extent that the August 2002 Memorandum suggested that “severe physical suffering” under the statute could in no circumstances be distinct from “severe physical pain,” *id.* at 6 n.3, we do not agree.

We begin with the statutory language. The inclusion of the words “or suffering” in the phrase “severe physical pain or suffering” suggests that the statutory category of physical torture is not limited to “severe physical pain.” This is especially so in light of the general principle against interpreting a statute in such a manner as to render words surplusage. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Exactly what is included in the concept of “severe physical suffering,” however, is difficult to ascertain. We interpret the phrase in a statutory context where Congress expressly distinguished “physical pain or suffering” from “mental pain or suffering.” Consequently, a separate category of “physical suffering” must

include something other than any type of “mental pain or suffering.”<sup>20</sup> Moreover, given that Congress precisely defined “mental pain or suffering” in the statute, it is unlikely to have intended to undermine that careful definition by including a broad range of mental sensations in a “physical suffering” component of “physical pain or suffering.”<sup>21</sup> Consequently, “physical suffering” must be limited to adverse “physical” rather than adverse “mental” sensations.

The text of the statute and the CAT, and their history, provide little concrete guidance as to what Congress intended separately to include as “severe physical suffering.” Indeed, the record consistently refers to “severe physical pain or suffering” (or, more often in the ratification record, “severe physical pain and suffering”), apparently without ever disaggregating the concepts of “severe physical pain” and “severe physical suffering” or discussing them as separate categories with separate content. Although there is virtually no legislative history for the statute, throughout the ratification of the CAT—which also uses the disjunctive “pain or suffering” and which the statutory prohibition implements—the references were generally to “pain and suffering,” with no indication of any difference in meaning. The Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which appears in S. Treaty Doc. No. 100-20, at 3, for example, repeatedly refers to “pain and suffering.” See also S. Exec. Rep. No. 101-30, at 6 (three uses of “pain and suffering”); *id.* at 13 (eight uses of “pain and suffering”); *id.* at 14 (two uses of “pain and suffering”); *id.* at 35 (one use of “pain and suffering”). Conversely, the phrase “pain or suffering” is used less frequently in the Senate report in discussing (as opposed to quoting) the CAT and the understandings under consideration, e.g.,

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<sup>20</sup> Common dictionary definitions of “physical” confirm that “physical suffering” does not include mental sensations. See, e.g., *American Heritage Dictionary of the English Language* at 1366 (“Of or relating to the body as distinguished from the mind or spirit”); *Oxford American Dictionary and Language Guide* at 748 (“of or concerning the body (*physical exercise; physical education*)”).

<sup>21</sup> This is particularly so given that, as Administration witnesses explained, the limiting understanding defining mental pain or suffering was considered necessary to avoid problems of vagueness. See, e.g., CAT Hearing at 8, 10 (prepared statement of Abraham Sofaer, Legal Adviser, Department of State) (“The Convention’s wording . . . is not in all respects as precise as we believe necessary. . . . [B]ecause [the Convention] requires establishment of criminal penalties under our domestic law, we must pay particular attention to the meaning and interpretation of its provisions, especially concerning the standards by which the Convention will be applied as a matter of U.S. law. . . . [W]e prepared a codified proposal which . . . clarifies the definition of mental pain and suffering.”); *id.* at 15–16 (prepared statement of Mark Richard) (“The basic problem with the Torture Convention—one that permeates all our concerns—is its imprecise definition of torture, especially as that term is applied to actions which result solely in mental anguish. This definitional vagueness makes it very doubtful that the United States can, consistent with Constitutional due process constraints, fulfill its obligation under the Convention to adequately engraft the definition of torture into the domestic criminal law of the United States.”); *id.* at 17 (prepared statement of Mark Richard) (“Accordingly, the Torture Convention’s vague definition concerning the mental suffering aspect of torture cannot be resolved by reference to established principles of international law. In an effort to overcome this unacceptable element of vagueness in Article I of the Convention, we have proposed an understanding which defines severe mental pain constituting torture with sufficient specificity to . . . meet Constitutional due process requirements.”).

*id.* at 5–6 (one use of “pain or suffering”), *id.* at 14 (two uses of “pain or suffering”); *id.* at 16 (two uses of “pain or suffering”), and, when used, it is with no suggestion that it has any different meaning.

Although we conclude that inclusion of the words “or suffering” in “severe physical pain or suffering” establishes that physical torture is not limited to “severe physical pain,” we also conclude that Congress did not intend “severe physical pain or suffering” to include a category of “physical suffering” that would be so broad as to negate the limitations on the other categories of torture in the statute. Moreover, the “physical suffering” covered by the statute must be “severe” to be within the statutory prohibition. We conclude that under some circumstances “physical suffering” may be of sufficient intensity and duration to meet the statutory definition of torture even if it does not involve “severe physical pain.” To constitute such torture, “severe physical suffering” would have to be a condition of some extended duration or persistence as well as intensity. The need to define a category of “severe physical suffering” that is different from “severe physical pain,” and that also does not undermine the limited definition Congress provided for torture, along with the requirement that any such physical suffering be “severe,” calls for an interpretation under which “severe physical suffering” is reserved for physical distress that is “severe” considering its intensity and duration or persistence, rather than merely mild or transitory.<sup>22</sup> Otherwise, the inclusion of such a category would lead to the kind of uncertainty in interpreting the statute that Congress sought to reduce both through its understanding to the CAT and in sections 2340–2340A.

### C. The Meaning of “Severe Mental Pain or Suffering”

Section 2340 defines “severe mental pain or suffering” to mean:

the prolonged mental harm caused by or resulting from—

- (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
- (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

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<sup>22</sup> Support for concluding that there is an extended temporal element, or at least an element of persistence, in “severe physical suffering” as a category distinct from “severe physical pain” may also be found in the prevalence of concepts of “endurance” of suffering and of suffering as a “state” or “condition” in standard dictionary definitions. See, e.g., *Webster’s Third New International Dictionary* at 2284 (defining “suffering” as “the endurance of or submission to affliction, pain, loss”; “a pain endured”); *Random House Dictionary of the English Language* 1901 (2d ed. 1987) (“the state of a person or thing that suffers”); *Funk & Wagnalls New Standard Dictionary of the English Language* 2416 (1946) (“A state of anguish or pain”); *American Heritage Dictionary of the English Language* at 1795 (“The condition of one who suffers”).

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality[.]

18 U.S.C. § 2340(2). Torture is defined under the statute to include an act specifically intended to inflict severe mental pain or suffering. *Id.* § 2340(1).

An important preliminary question with respect to this definition is whether the statutory list of the four “predicate acts” in section 2340(2)(A)–(D) is exclusive. We conclude that Congress intended the list of predicate acts to be exclusive—that is, to constitute the proscribed “severe mental pain or suffering” under the statute, the prolonged mental harm must be caused by acts falling within one of the four statutory categories of predicate acts. We reach this conclusion based on the clear language of the statute, which provides a detailed definition that includes four categories of predicate acts joined by the disjunctive and does not contain a catch-all provision or any other language suggesting that additional acts might qualify (for example, language such as “including” or “such acts as”).<sup>23</sup> Congress plainly considered very specific predicate acts, and this definition tracks the Senate’s understanding concerning mental pain or suffering when giving its advice and consent to ratification of the CAT. The conclusion that the list of predicate acts is exclusive is consistent with both the text of the Senate’s understanding and the fact that it was adopted out of concern that the CAT’s definition of torture did not otherwise meet the requirement for clarity in defining crimes. *See supra* note 21. Adopting an interpretation of the statute that expands the list of predicate acts for “severe mental pain or suffering” would constitute an impermissible rewriting of the statute and would introduce the very imprecision that prompted the Senate to adopt its understanding when giving its advice and consent to ratification of the CAT.

Another question is whether the requirement of “prolonged mental harm” caused by or resulting from one of the enumerated predicate acts is a separate requirement, or whether such “prolonged mental harm” is to be presumed any time one of the predicate acts occurs. Although it is possible to read the statute’s reference to “*the* prolonged mental harm caused by or resulting from” the predicate acts as creating a statutory presumption that each of the predicate acts always causes prolonged mental harm, we do not believe that was Congress’s intent. As

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<sup>23</sup> These four categories of predicate acts “are members of an ‘associated group or series,’ justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.” *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)). *See also, e.g., Leatheman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); 2A Norman J. Singer, *Statutes and Statutory Construction* § 47.23 (6th ed. 2000). Nor do we see any “contrary indications” that would rebut this inference. *Vonn*, 535 U.S. at 65.

noted, this language closely tracks the understanding that the Senate adopted when it gave its advice and consent to ratification of the CAT:

in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

S. Exec. Rep. No. 101-30, at 36. We do not believe that simply by adding the word “the” before “prolonged harm,” Congress intended a material change in the definition of mental pain or suffering as articulated in the Senate’s understanding to the CAT. The legislative history, moreover, confirms that sections 2340–2340A were intended to fulfill—but not go beyond—the United States’ obligations under the CAT: “This section provides the necessary legislation to implement the [CAT]. . . . The definition of torture emanates directly from article 1 of the [CAT]. The definition for ‘severe mental pain and suffering’ incorporates the [above mentioned] understanding.” S. Rep. No. 103-107, at 58–59 (1993). This understanding, embodied in the statute, was meant to define the obligation undertaken by the United States. Given this understanding, the legislative history, and the fact that section 2340(2) defines “severe mental pain or suffering” carefully in language very similar to the understanding, we do not believe that Congress intended the definition to create a presumption that any time one of the predicate acts occurs, prolonged mental harm is deemed to result.

Turning to the question of what constitutes “prolonged mental harm caused by or resulting from” a predicate act, we believe that Congress intended this phrase to require mental “harm” that is caused by or that results from a predicate act, and that has some lasting duration. There is little guidance to draw upon in interpreting this phrase.<sup>24</sup> Nevertheless, our interpretation is consistent with the ordinary meaning of the statutory terms. First, the use of the word “harm”—as opposed to simply repeating “pain or suffering”—suggests some mental damage or injury.

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<sup>24</sup> The phrase “prolonged mental harm” does not appear in the relevant medical literature or elsewhere in the United States Code. The August 2002 Memorandum concluded that to constitute “prolonged mental harm,” there must be “significant psychological harm of significant duration, e.g., lasting for months or even years.” *Id.* at 1; *see also id.* at 7. Although we believe that the mental harm must be of some lasting duration to be “prolonged,” to the extent that that formulation was intended to suggest that the mental harm would have to last for at least “months or even years,” we do not agree.

Ordinary dictionary definitions of “harm,” such as “physical or mental *damage: injury*,” *Webster’s Third New International Dictionary* at 1034 (emphasis added), or “[p]hysical or psychological *injury or damage*,” *American Heritage Dictionary of the English Language* at 825 (emphasis added), support this interpretation. Second, to “prolong” means to “lengthen in time” or to “extend in duration,” or to “draw out,” *Webster’s Third New International Dictionary* at 1815, further suggesting that to be “prolonged,” the mental damage must extend for some period of time. This damage need not be permanent, but it must continue for a “prolonged” period of time.<sup>25</sup> Finally, under section 2340(2), the “prolonged mental harm” must be “caused by” or “resulting from” one of the enumerated predicate acts.<sup>26</sup>

Although there are few judicial opinions discussing the question of “prolonged mental harm,” those cases that have addressed the issue are consistent with our view. For example, in the TVPA case of *Mehinovic*, the court explained that:

[The defendant] also caused or participated in the plaintiffs’ mental torture. Mental torture consists of “prolonged mental harm caused by or resulting from: the intentional infliction or threatened infliction of severe physical pain or suffering; . . . the threat of imminent death . . . .” As set out above, plaintiffs noted in their testimony that they feared that they would be killed by [the defendant] during the beatings he inflicted or during games of “Russian roulette.” *Each plaintiff continues to suffer long-term psychological harm as a result of the ordeals they suffered at the hands of defendant and others.*

198 F. Supp. 2d at 1346 (emphasis added; first ellipsis in original). In reaching its conclusion, the court noted that the plaintiffs were continuing to suffer serious

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<sup>25</sup> For example, although we do not suggest that the statute is limited to such cases, development of a mental disorder—such as post-traumatic stress disorder or perhaps chronic depression—could constitute “prolonged mental harm.” See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 369–76, 463–68 (4th ed. 2000) (“DSM-IV-TR”). See also, e.g., Special Rapporteur of the Commission on Human Rights, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ¶ 49, U.N. Doc. A/59/324, at 14 (Sept. 1, 2004) (by Theo van Boven) (“The most common diagnosis of psychiatric symptoms among torture survivors is said to be post-traumatic stress disorder.”); see also Metin Basoglu et al., *Torture and Mental Health: A Research Overview, in The Mental Health Consequences of Torture* 48–49 (Ellen Gerrity et al. eds., 2001) (referring to findings of higher rates of post-traumatic stress disorder in studies involving torture survivors); Murat Parker et al., *Psychological Effects of Torture: An Empirical Study of Tortured and Non-Tortured Non-Political Prisoners, in Torture and Its Consequences: Current Treatment Approaches* 77 (Metin Basoglu ed., 1992) (referring to findings of post-traumatic stress disorder in torture survivors).

<sup>26</sup> This is not meant to suggest that, if the predicate act or acts continue for an extended period, “prolonged mental harm” cannot occur until after they are completed. Early occurrences of the predicate act could cause mental harm that could continue—and become prolonged—during the extended period the predicate acts continued to occur. For example, in *Sackie v. Ashcroft*, 270 F. Supp. 2d 596, 601–02 (E.D. Pa. 2003), the predicate acts continued over a three-to-four-year period, and the court concluded that “prolonged mental harm” had occurred during that time.

mental harm even ten years after the events in question: One plaintiff “suffers from anxiety, flashbacks, and nightmares and has difficulty sleeping. [He] continues to suffer thinking about what happened to him during this ordeal and has been unable to work as a result of the continuing effects of the torture he endured.” *Id.* at 1334. Another plaintiff “suffers from anxiety, sleeps very little, and has frequent nightmares. . . . [He] has found it impossible to return to work.” *Id.* at 1336. A third plaintiff “has frequent nightmares. He has had to use medication to help him sleep. His experience has made him feel depressed and reclusive, and he has not been able to work since he escaped from this ordeal.” *Id.* at 1337–38. And the fourth plaintiff “has flashbacks and nightmares, suffers from nervousness, angers easily, and has difficulty trusting people. These effects directly impact and interfere with his ability to work.” *Id.* at 1340. In each case, these mental effects were continuing years after the infliction of the predicate acts.

And in *Sackie v. Ashcroft*, 270 F. Supp. 2d 596 (E.D. Pa. 2003), the individual had been kidnapped and “forcibly recruited” as a child soldier at the age of 14, and over the next three to four years had been forced to take narcotics and threatened with imminent death. *Id.* at 597–98, 601–02. The court concluded that the resulting mental harm, which continued over this three-to-four-year period, qualified as “prolonged mental harm.” *Id.* at 602.

Conversely, in *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285 (S.D. Fla. 2003), the court rejected a claim under the TVPA brought by individuals who had been held at gunpoint overnight and repeatedly threatened with death. While recognizing that the plaintiffs had experienced an “ordeal,” the court concluded that they had failed to show that their experience caused lasting damage, noting that “there is simply no allegation that Plaintiffs have suffered any prolonged mental harm or physical injury as a result of their alleged intimidation.” *Id.* at 1294–95.

#### **D. The Meaning of “Specifically Intended”**

It is well recognized that the term “specific intent” is ambiguous and that the courts do not use it consistently. *See* 1 Wayne R. LaFare, *Substantive Criminal Law* § 5.2(e), at 355 & n.79 (2d ed. 2003). “Specific intent” is most commonly understood, however, “to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime.” *Id.* at 354; *see also Carter v. United States*, 530 U.S. 255, 268 (2000) (explaining that general intent, as opposed to specific intent, requires “that the defendant possessed knowledge [only] with respect to the *actus reus* of the crime”). As one respected treatise explains:

With crimes which require that the defendant intentionally cause a specific result, what is meant by an “intention” to cause that result? Although the theorists have not always been in agreement . . . , the traditional view is that a person who acts . . . intends a result of his

act . . . under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; and (2) when he knows that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.

1 LaFave, *Substantive Criminal Law*, § 5.2(a), at 341 (footnote omitted).

As noted, the cases are inconsistent. Some suggest that only a conscious desire to produce the proscribed result constitutes specific intent; others suggest that even reasonable foreseeability suffices. In *United States v. Bailey*, 444 U.S. 394 (1980), for example, the Court suggested that, at least “[i]n a general sense,” *id.* at 405, “specific intent” requires that one consciously desire the result. *Id.* at 403–05. The Court compared the common law’s *mens rea* concepts of specific intent and general intent to the Model Penal Code’s *mens rea* concepts of acting purposefully and acting knowingly. *Id.* at 404–05. “[A] person who causes a particular result is said to act purposefully,” wrote the Court, “if ‘he consciously desires that result, whatever the likelihood of that result happening from his conduct.’” *Id.* at 404 (internal quotation marks omitted). A person “is said to act knowingly,” in contrast, “if he is aware ‘that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.’” *Id.* (internal quotation marks omitted). The Court then stated: “In a general sense, ‘purpose’ corresponds loosely with the common-law concept of specific intent, while ‘knowledge’ corresponds loosely with the concept of general intent.” *Id.* at 405.

In contrast, cases such as *United States v. Neiswender*, 590 F.2d 1269 (4th Cir. 1979), suggest that to prove specific intent it is enough that the defendant simply have “knowledge or notice” that his act “would have likely resulted in” the proscribed outcome. *Id.* at 1273. “Notice,” the court held, “is provided by the reasonable foreseeability of the natural and probable consequences of one’s acts.” *Id.*

We do not believe it is useful to try to define the precise meaning of “specific intent” in section 2340.<sup>27</sup> In light of the President’s directive that the United States not engage in torture, it would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture. Some observations, however, are appropriate. It is clear that the specific intent element of section 2340 would be met if a defendant performed an act and “consciously desire[d]” that act to inflict severe physical or mental pain or suffering. 1 LaFave, *Substantive Criminal Law* § 5.2(a), at 341. Conversely, if an individual acted in good faith, and only after reasonable investigation establishing

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<sup>27</sup> In the August 2002 Memorandum, this Office concluded that the specific intent element of the statute required that infliction of severe pain or suffering be the defendant’s “precise objective” and that it was not enough that the defendant act with knowledge that such pain “was reasonably likely to result from his actions” (or even that that result “is certain to occur”). *Id.* at 3–4. We do not reiterate that test here.

that his conduct would not inflict severe physical or mental pain or suffering, it appears unlikely that he would have the specific intent necessary to violate sections 2340–2340A. Such an individual could be said neither consciously to desire the proscribed result, *see, e.g., Bailey*, 444 U.S. at 405, nor to have “knowledge or notice” that his act “would likely have resulted in” the proscribed outcome, *Neiswender*, 590 F.2d at 1273.

Two final points on the issue of specific intent: First, specific intent must be distinguished from motive. There is no exception under the statute permitting torture to be used for a “good reason.” Thus, a defendant’s motive (to protect national security, for example) is not relevant to the question whether he has acted with the requisite specific intent under the statute. *See Cheek v. United States*, 498 U.S. 192, 200–01 (1991). Second, specific intent to take a given action can be found even if the defendant will take the action only conditionally. *Cf., e.g., Holloway v. United States*, 526 U.S. 1, 11 (1999) (“[A] defendant may not negate a proscribed intent by requiring the victim to comply with a condition the defendant has no right to impose.”). *See also id.* at 10–11 & nn. 9–12; Model Penal Code § 2.02(6). Thus, for example, the fact that a victim might have avoided being tortured by cooperating with the perpetrator would not make permissible actions otherwise constituting torture under the statute. Presumably that has frequently been the case with torture, but that fact does not make the practice of torture any less abhorrent or unlawful.<sup>28</sup>

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<sup>28</sup> In the August 2002 Memorandum, this Office indicated that an element of the offense of torture was that the act in question actually result in the infliction of severe physical or mental pain or suffering. *See id.* at 3. That conclusion rested on a comparison of the statute with the CAT, which has a different definition of “torture” that requires the actual infliction of pain or suffering, and we do not believe that the statute requires that the defendant actually inflict (as opposed to act with the specific intent to inflict) severe physical or mental pain or suffering. *Compare* CAT art. 1(1) (“the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, *is intentionally inflicted*”) (emphasis added) *with* 18 U.S.C. § 2340 (“‘torture’ means an act . . . *specifically intended to inflict* severe physical or mental pain or suffering”) (emphasis added). It is unlikely that any such requirement would make any practical difference, however, since the statute also criminalizes attempts to commit torture. 18 U.S.C. § 2340A(a).